CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, June 28, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF LINERBOARD

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of linerboard as uncoated kraft paper. Notice of the proposed revocation was published May 17, 1995, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 11, 1995.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Office of Regulations and Rulings, Textile Classification Branch (202–482–7014).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 17, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, No. 20, proposing to revoke New York Ruling Letter

(NYRL) 886928, dated July 20, 1993, which classified linerboard as uncoated kraft paper in subheadings 4804.41.4000 and 4804.59.0000, HTSUSA, depending on basis weights. Recent laboratory analysis of the linerboard indicates that it is in fact constructed of multi-layers or plies that are bound together in the production process with an adhesive. This fact was not known to Customs at the time NYRL 886928 was issued. The proposed revocation of NYRL 886928 considered this fact and, based thereon, reflected proper classification for the linerboard in subheading 4807.99.4000, HTSUSA, which provides for composite paper and paperboard made by sticking flat layers of paper or paperboard together with an adhesive. No comments were received in response to the notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), this notice advises interested parties that Customs is revoking NYRL 886928. Headquarters Ruling Letter 957616, revoking NYRL 886928, is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice as contemplated in section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: June 23, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 23, 1995.

CLA–2 R:C:T 957616 BC
Category: Classification
Tariff No.: 4807.99.4000

LISA LEVAGGI BORTER, ESQ.
ADDUCI, MASTRIANI, SCHAUMBERG & SCHILL
1140 Connecticut Avenue, N.W.
Washington, DC 20036

Re: Revocation of NYRL 886928; classification of gypsum linerboard; composite paper constructed with an adhesive.

DEAR MS. BORTER:

This responds to your letter of December 15, 1994, wherein you requested reconsideration of New York Ruling Letter (NYRL) 886928 on behalf of your client Weig Karton, Inc. That ruling classified linerboard in heading 4804, Harmonized Tariff Schedule of the

United States Annotated (HTSUSA), which provides for uncoated kraft paper and paperboard, in rolls or sheets. You contend that the information upon which that ruling was based was incomplete and that the linerboard should be classified in heading 4807, HTSUSA, which provides for certain composite paper and paperboard, in rolls or sheets.

Upon review of the matter, we concluded that NYRL 886928 should be revoked for the reasons set forth below. Pursuant to section 625, tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization), notice of the proposed revocation was published May 17, 1995, in the CUSTOMS BULLETIN, Volume 29, No. 20. No comments were received in response to the notice.

Facts:

On July 20, 1993, Customs issued NYRL 886928 to Montgomery International, Inc., on behalf of M.J. Weig & Co. The ruling described the merchandise therein classified as: (1) a lighter weight linerboard, weighing 221.1 g/sq. meter, with a Mullen bursting strength of 500.3, and consisting of more than 95% by weight of chemical unbleached kraft pulp fibers; and (2) a heavier weight linerboard, weighing 229.7 g/sq. meter, with a Mullen bursting strength of 558.9, and consisting of a mixture of bleached and unbleached draft pulp fibers (not uniformly bleached throughout the mass). The ruling noted that neither linerboard met the tariff definition of "kraftliner" in Subheading Note 1 to Chapter 48, HTSUSA.

The ruling classified the lighter weight linerboard in subheading 4804.41.4000, HTSUSA, as other unbleached draft paper or paperboard, weighing more than 150 g/sq. meter but less than 225 g/sq. meter, and the heavier weight linerboard in subheading 4804.59.0000, HTSUSA, as other kraft paper or paperboard, weighing 225 g/sq. meter or more.

In your letter, you stated that the facts presented to Customs at the time of the NY ruling were incomplete; thus, in the absence of a significant fact, Customs misclassified the linerboard. That fact is the presence of an adhesive used to bind the seven plies that make up the linerboard at issue.

Issue:

What is the proper classification for the linerboard at issue consisting of seven plies bound together with an adhesive?

Law and Analysis:

New York Ruling Letter 886928 was issued based on the information then available to Customs. The supplier of that information failed to point out that the linerboard was constructed through a process that employed an adhesive to bind its plies. This previous ruling request provided the following information regarding this point: "The seven sheets are couched together under pressure to form a seven ply single sheet and then steam dried. The dry seven ply single sheet is then rolled into reels." The Customs laboratory examined the samples then submitted and concluded that there was no adhesive present. Thus, the ruling was based in part on the then understood fact that the linerboard's plies were not bound with an adhesive.

In your letter, you disclosed the omitted fact that an adhesive is used in production of the linerboard; you stated that in the production process, an adhesive is "sprayed on each sheet and the seven plies are pressed together and steam dried." You indicated that in a meeting at Customs New York Seaport office, our National Import Specialist experienced in the classification of paper and paperboard products concluded that if the linerboard is constructed with the use of an adhesive, as you described, it should be classified in heading 4807, HTSUSA, as composite paper and paperboard (made by sticking flat layers of paper or paperboard together with an adhesive).

The samples of linerboard you submitted with the instant request for reconsideration were examined at the Customs laboratory. Its report #2–95–30582, dated January 27, 1995, indicates that an adhesive is present. We are now convinced that the linerboard tested and reported on in this lab report (#2–95–30582) is the same type of product classified in NYRL 886928. Since we herein recognize that the linerboard there classified was misdescribed, as hereinabove explained, and thus misclassified, we conclude that NYRL 886928 should be revoked and replaced by the instant ruling.

Holding:

The linerboard at issue, constructed with an adhesive to bind its multi-layers (plies), is classifiable in subheading 4807.99.4000, HTSUSA, which provides in part for composite paper made by sticking flat layers of paper together with an adhesive, not surface-coated or

impregnated, whether or not internally reinforced, in rolls or sheets: other: other: other. The applicable duty rate is "Free." Accordingly, NYRL 886928 is hereby revoked.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position as contemplated in section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF A HANDBAG WITH OUTER SURFACE OF PAPER YARNS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625 (c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of a handbag with outer surface of paper yarns. Notice of the proposed modification was published on May 17, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 20.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 11, 1995.

FOR FURTHER INFORMATION CONTACT: Carlos Halasz, Textile Classification Branch, Office of Regulations and Rulings, (202) 482–7059.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 17, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 20, proposing to modify District Ruling (DD) 802183, issued October 11, 1994, wherein a handbag, with outer surface of paper yarns, was classified in subheading 4202.22.6000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for certain handbags, with outer surface of vegetable fibers and not of pile or tufted construction. No comments were received in response to the notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation

Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying DD 802183 to reflect the proper classification of the merchandise in subheading 4202.22.8060, HTSUS, which provides for handbags, with outer surface of other textile materials. Headquarters Ruling Letter (HRL) 957758, modifying DD 802183, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: June 23, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, June 23, 1995.

CLA–2 R:C:T 957758 ch
Category: Classification
Tariff No.: 4202.22.8060

MS. JANE VERGONA
TOTAL PORT CLEARANCE
10 Fifth Street
Valley Stream, NY 11581

Re: Modification of DD 802183; tariff classification of a handbag, with outer surface of paper yarn.

DEAR MS. VERGONA:

In District Ruling (DD) 802183, dated October 11, 1994, you were advised that a ladies handbag with an outer surface of twisted paper yarns was classifiable in subheading 4202.22.6000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for handbags, with outer surface of vegetable fibers and not of pile or tufted construction. We have had occasion to review DD 802183 and find that the classification of the handbag in subheading 4202.22.6000, HTSUS, is partially in error.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of DD 802183 was published May 17, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 20.

Facts:

In DD 802183, the merchandise was described as follows:

> The sample submitted with your request, Style 8015/8016 is a ladies handbag with an outer surface of twisted paper yarns. The bag measures approximately 10 x 9 inches with a non-detachable shoulder strap. It is fabric lined with a zippered interior compartment.

Issue:

Whether the handbag with outer surface of twisted paper yarns is classifiable in subheading 4202.22.6000, HTSUS, which provides for certain handbags, with outer surface of

vegetable fibers and not of pile or tufted construction; or subheading 4202.22.8060, HTSUS, which provides for handbags, with outer surface of other textile materials?

Law and Analysis:

Subheading 4202.22, HTSUS, provides in part for handbags, with outer surface of textile materials. At the eight-digit classification level, handbags are further segregated according to the material composition of their outer surface. The instant handbag possesses an outer surface of paper yarns. In DD 802183, the paper yarns were classified as vegetable fibers of subheading 4202.22.6000, HTSUS.

Section XI, HTSUS, encompasses textiles and textile articles. Within Section XI, the classification of paper yarns is governed by heading 5308, HTSUS, which provides for "yarn of other vegetable fibers; paper yarns." The Explanatory Note to heading 5308, at page 747, delineates the scope of the heading:

> **(A) Yarn of other vegetable textile fibres.**
> This group covers yarns, whether single or multiple (folded), obtained by spinning the fibres of true hemp of heading 53.02, of the vegetable textile fibres of heading 53.04 or 53.05, or of the vegetable fibres not classified in Section XI (in particular those of Chapter 14, e.g. kapok or istle).
>
> * * * * * * *
>
> **(B) Paper yarn.**
> This group covers yarns, whether single or multiple (folded), of paper.
>
> * * * * * * *
>
> Single yarns are obtained by twisting or rolling lengthwise strips of moist paper (sometimes coated); multiple (folded) yarns are obtained by doubling two or more single yarns.

The placement of the semi-colon in heading 5308 between the terms "yarns of other vegetable textile fibers" and "paper yarn," as well as the scope of the heading as set forth in the applicable Explanatory Note, indicate that paper yarn is a group of textile material distinct from yarns of vegetable textile fibers. For this reason, the instant handbag is not classifiable in subheading 4202.22.6000, HTSUS.

Subheading 4202.22 does not possess an eight-digit breakout dedicated specifically to handbags with an outer surface of paper yarns. Consequently, classification devolves to subheading 4202.22.8060, HTSUS, which provides for handbags, with outer surface of other textile materials.

Holding:

DD 802183 is hereby modified. The subject merchandise is classifiable under subheading 4202.22.8060, HTSUS, which provides for handbags, whether or not with shoulder strap, including those without handle: with outer surface of textile materials: other: other, other, other. The applicable rate of duty is 19.8 percent *ad valorem*. The textile category is 871.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are the subject of frequent negotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

In accordance with 19 U.S.C. 1625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decision pursuant to section 625 does not constitute a change of practice of position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF SURGICAL PAPER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification of creped and impregnated surgical paper. Notice of the proposed modification was published May 17, 1995, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 11, 1995.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Office of Regulations and Rulings, Textile Classification Branch (202–482–7014).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 17, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, No. 20, proposing to modify New York Ruling Letter (NYRL) 845580, dated November 20, 1989. That ruling classified surgical paper identified as "Sterisheet #22" in subheading 4811.39.4040, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for other paper impregnated with plastics (excluding adhesives). It also classified a product identified as "Sterisheet #44" in the same subheading. Recent laboratory analyses of "Sterisheet #22" indicate that it is impregnated with an organic material, not a plastic. The proposed modification, based on this new information, reflected proper classification for "Sterisheet #22" in subheading 4811.90.8000, HTSUSA, which provides for other impregnated paper, weighing over 30 grams per square mater. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), this notice advises interested parties that Customs is modifying NYRL 845580. Headquarters Ruling Letter 957530, modifying the New York ruling, is set forth as an attachment to this document. Note that NYRL 845580 remains valid as to the "Sterisheet #44" therein classified.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 23, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 23, 1995.

CLA-2 R:C:T 957530
Category: Classification
Tariff No.: 4811.90.8000

GEORGE M. KELLER
ARJO WIGGINS MEDICAL, INC.
1220-K Kennestone Circle
Marietta, GA 30066

Re: Modification of NYRL 845580; classification of Sterisheet #22; creped surgical paper impregnated with organic material; Legal Note 6, Chapter 48, HTSUSA.

DEAR MR. KELLER:

This responds to your letter of July 1, 1994, wherein you requested that we reconsider New York Ruling Letter (NYRL) 845580, issued November 20, 1989. That ruling classified a surgical paper identified as "Sterisheet #22."

Upon review of the matter, we concluded that NYRL 845580 should be modified for the reasons set forth below. Pursuant to section 625, tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization), notice of the proposed modification was published May 17, 1995, in the CUSTOMS BULLETIN, Volume 29, No. 20. No comments were received in response to the notice.

Facts:

In NYRL 845580, issued to you (then representing Customs Advisory Services, Inc.) on November 20, 1989, Customs classified paper products identified as Sterisheet #22 and Sterisheet #44 in subheading 4811.39.4040, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for other (than certain enumerated) paper impregnated with plastics (excluding adhesives). The merchandise was described in that ruling as "sheets of blue, uncoated, creped paper, consisting of 100 percent chemical pulp fibers, impregnated with a plastics material (acrylic type) that binds the fibers and is not an adhesive."

On June 1, 1994, Customs issued NYRL 897254 (again issued to you for Customs Advisory Services, Inc.), which classified a paper product identified as Sterisheet #10 in subheading 4808.30.0000, HTSUSA, which provides for kraft paper (other than sack kraft paper), creped or crinkled, whether or not embossed or perforated (if imported in rolls exceeding 15 cm in width or in rectangular sheets with one side exceeding 15 cm and the other exceeding 36 cm in an unfolded condition). In that ruling, the merchandise was found to consist of chemical bleached kraft pulp fibers and to be uncoated and unimpregnated.

You contend that NYRL 897254 overruled that part of NYRL 845580 that pertains to Sterisheet #22 and that this product should be reclassified in subheading 4808.30.0000, HTSUSA.

In your July 1, 1995, letter, you described Sterisheet #22 as creped surgical paper used in hospitals. You stated that it consists of 100% wood pulp fibers and that it is not coated or impregnated. You submitted three sheets of blue paper as samples for our examination.

The samples were examined and analyzed by the Customs Laboratory at our New York Seaport office. Two laboratory reports confirm that the merchandise at issue is blue, uncoated creped paper consisting of more than 95% chemical pulp fibers. Also, it is impregnated with an organic material, not a plastic. (Laboratory Reports dated November 2, 1994 (#2–94–31077–001) and December 22, 1994 (#2–95–30525–001).)

Issue:

What is the proper classification of the impregnated and creped surgical paper at issue, identified as Sterisheet #22?

Law and Analysis:

Initially, we conclude that NYRL 897254 (1994) does not overrule NYRL 845580 (1989), for the reason that these rulings pertain to different articles. The former ruling classified a product identified as Sterisheet #10, while the latter ruling, in part, classified Sterisheet #22. The respective descriptions of the merchandise classified in these rulings do not match. The paper in NYRL 845580 is a chemical pulp paper, while the paper in NYRL 897254 is a chemical kraft pulp paper. Also, the former paper is impregnated with plastic material, while the latter is unimpregnated.

Despite the foregoing, NYRL 845580 should be modified to reflect proper classification of Sterisheet #22 in accordance with the recent laboratory findings, as set forth in the "Facts" section. We understand that the Sterisheet #22 that is the subject of the instant ruling request is the same product as that classified in NYRL 845580. Apparently, this product was not accurately described in that ruling, as there was no laboratory analysis. The recent laboratory analyses of the samples of Sterisheet #22 that you submitted with this ruling request show that, unlike the description of Sterisheet #22 in NYRL 845580 (impregnated with plastic), Sterisheet #22 is a creped paper impregnated with an organic material, not a plastic.

Based on the laboratory findings pertaining to the samples of Sterisheet #22 at issue here, we find that it fits the descriptions of two headings in Chapter 48, HTSUSA. These are heading 4808 pertaining to creped paper and heading 4811 pertaining to impregnated paper. Consequently, according to Legal Note 6, Chapter 48, HTSUSA, the merchandise should classify in the heading that occurs last in numerical order. That note provides the following:

> Paper, paperboard, cellulose wadding and webs of cellulose fibers answering to a description in two or more of the headings 4801 to 4811 are to be classified under that one of such headings which occurs last in numerical order in the tariff schedule.

Based on the foregoing, we conclude that the paper product described as above and identified as Sterisheet #22 is classifiable in subheading 4811.90.8000, HTSUSA, as other impregnated paper, weighing over 30 grams per square meter.

Holding:

The paper product Sterisheet #22 identified as a creped surgical paper impregnated with an organic material, not a plastic, is classifiable in subheading 4811.90.8000, HTSUSA. The applicable duty rate is 1.8% *ad valorem*. Accordingly, NYRL 845580 is hereby modified. That part of NYRL 845580 pertaining to Sterisheet #44 remains valid.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position as contemplated in section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER RELATING TO THE *DE MINIMIS* RULE UNDER SECTION 5 OF THE NAFTA RULES OF ORIGIN REGULATIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Modification of advance ruling letter under article 509 of the North American Free Trade Agreement (NAFTA).

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Act (Pub. L. 103 Stat. 2057), this notice advises interested parties that Customs is modifying a NAFTA advance ruling with respect to that part of the ruling that addresses the application of the *de minimis* rule under section 5 of the NAFTA Rules of Origin Regulations. Notice of the proposed modification was published in the CUSTOMS BULLETIN, Vol. 29, No. 20.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 11, 1995.

FOR FURTHER INFORMATION CONTACT: Charles Steuart, Value Branch, (202) 482–7010.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 17, 1995, Customs published a notice in the CUSTOMS BULLETIN, Vol. 29, No. 20, that proposed modifying Headquarters Ruling Letter (HRL) 956604, dated September 26, 1994, which held a tarpaulin system qualified as an originating good under the *de minimis* provision of section 5. However, we have determined that HQ 956604 was based on incorrect factual information.

No comments were received in response to the May 17th notice. Accordingly, pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Act (Pub. L. 103–182, 103 Stat. 2057), this notice advises interested parties that Customs is modifying HRL 956604 with respect to that part of the ruling that addresses the application of the *de minimis* rule under section 5 of the NAFTA Rules of Origin Regulations. HRL 545891, which modifies HRL 956604, is set forth as an attachment to this document.

The publication of rulings or decisions pursuant to section 625 of the Tariff Act of 1930, as amended, does not establish a practice or position.

Dated: June 23, 1995.

THOMAS L. LOBRED,
(for John Durant, Director,
Commercial Ruling Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 23, 1995.

VAL R:C:V 545891 CRS
Category: Valuation

MR. WALT KOPPELAAR
CURTAINSIDER, INC.
1318 Rymal Road East
Hamilton, Ontario L8W 3N1

Re: Article 509; NAFTA; modification of HRL 956604; section 5, NAFTA rules of origin regulations; *de minimis*.

DEAR MR. KOPPELAAR:

This is to advise you that we have had occasion to review Headquarters Ruling Letter (HRL) 956604, dated September 26, 1994, with respect to that portion of the ruling that concerns the *de minimis* rule for determining whether a good produced with non-originating materials that do not undergo a change in classification nevertheless qualifies as an originating good under the North American Free Trade Agreement (NAFTA). As the result of our review we have determined that HRL 956604 should be modified. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Act (Pub. L. 103–182, 103 Stat. 2057), Customs published a notice of the proposed modification on May 17, 1995, in the CUSTOMS BULLETIN, Vol. 29, No. 20.

Facts:

HRL 956604 concerned a "Tautliner" tarpaulin system, classified in tariff item 8716.90.50, Harmonized Tariff Schedule of the United States (HTSUS), that was designed to convert a flat-bed trailer or semi-trailer into a van. The tarpaulin system, which is made from both originating and non-originating materials, is imported into the United States either separately, or as part of, and permanently mounted onto, a trailer or semi-trailer.

Nevertheless, because some of the materials used in the production of the tarpaulin system did not undergo the required change in tariff classification, it was determined that system did not qualify as an originating good for NAFTA purposes. In this regard, HRL 956604 stated in pertinent part:

> However, originating status is conferred on the system because the value of the tensioning device—0.62 percent of the total cost or value-is considered *de minimis*, that is, it is not more than 7 percent of the transaction value of the tarpaulin system under section 402(b) of the Tariff Act of 1930, as amended, adjusted to an F.O.B. basis, or if transaction value is unacceptable, the value of the tensioning device is not more than 7 percent of the total cost of the tarpaulin system. **General Note 12(f)(I), HTSUS.** The tarpaulin systems, therefore, qualify as originating goods for NAFTA purposes.

HRL 956604, at 3–4. Similarly, HRL 956604 concluded that the tarpaulin system, imported as part of a trailer or semi-trailer, qualified as an originating good under the *de minimis* rule. However, this determination was incorrect since the information submitted in support of the *de minimis* calculation was subsequently determined to be based on a breakdown by weight of the materials used in the production of the tarpaulin system, rather than on the transaction value of the tarpaulin system as required by the Customs Regulations.

Issue:

The issue presented is whether the tarpaulin system qualifies as an originating good pursuant to the *de minimis* rule.

Law and Analysis:

Section 181.100, Customs Regulations (19 C.F.R. § 181.100), provides that any NAFTA advance ruling letter may be modified or revoked if, *inter alia*, it reflects or is based on an error of the tarpaulin system for purposes of determining *de minimis*. Accordingly, that portion of the ruling dealing with *de minimis* is modified in conformity with the following.

The Appendix to part 181.131, Customs Regulations (19 C.F.R. § 181.131; the NAFTA Rules of Origin Regulations (the "ROR")), provides in relevant part at section 5:

(1) Except as otherwise provided in subsection (4), a good shall be considered to originate in the territory of a NAFTA country where the value of all non-originating materials that are used in the production of the good and that do not undergo an applicable change in tariff classification as a result of production occurring entirely in the territory of one or more of the NAFTA countries is not more than seven percent

(a) of the transaction value of the good determined in accordance with Schedule II with respect to the transaction in which the producer of the good soid the good, adjusted to an F.O.B. basis,* * *

ROR, section 5(1)(a). Thus in order for the "Tautliner" tarpaulin system (the "good"), whether imported separately or as part of trailer, to qualify as an originating good under section 5(1)(a), it is necessary to determine the transaction value of the good in accordance with Schedule II, then determine in accordance with Schedule VIII whether the value of the non-originating materials used in the production of the good is not more than seven percent of the good's transaction value.

We have enclosed copies of section 5(1), Schedule II and Schedule VIII in order to assist you in determining whether the Tautliner tarpaulin system qualifies as an originating good under NAFTA. If you wish U.S. Customs to make this determination, in resubmitting your ruling request, please provide us with sufficient information to calculate the transaction value of the good in accordance with Schedule II, and the value of non-originating materials in accordance with Schedule VIII. 19 C.F.R. § 181.93(b)(2)(i).

Holding:

If the value of the non-originating materials used in the production of the good that do not undergo a change in classification is not more than seven percent of the transaction value of the tarpaulin system, determined in accordance with Schedule II, the system qualifies as an originating good in accordance with section 5(1)(a) of the ROR.

HRL 956604, dated September 26, 1994, is modified in conformity with the foregoing. In accordance with section 625(c)(1), this ruling will become effective sixty days after its publication in the CUSTOMS BULLETIN. The publication of rulings or decisions pursuant to section 625 of the Tariff Act of 1930, as amended, does not establish a practice or position.

THOMAS L. LOBRED,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF WOMEN'S WOVEN COTTON FLANNEL BOXER SHORTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify, in part, a ruling pertaining to the tariff classification of certain women's woven cotton flannel boxer shorts. comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before August 11, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, DC 20229. comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington DC.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Classification Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify, in part, a ruling pertaining to the tariff classification of certain women's woven cotton flannel boxer shorts.

In Headquarters ruling letter (HQ) 951754, dated June 24, 1992, certain women's woven cotton flannel boxer short were classified as women's shorts in subheading 6204.62.4055, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), based in part on objective criteria used as aid in determining whether men's boxer style garments were non-underwear garments. This ruling letter is set forth in "Attachment A". Since the issuance of HQ 951754, this office has addressed the classification of these types of garments on numerous occasions and it is our opinion that the analysis in HQ 951754 is in error. The outcome remains unchanged.

At issue in this proposed modification are the guidelines which were used as part of the analysis to determine whether the women's boxer shorts should be classified as sleepwear or shorts. The criteria in those guidelines were created for **men's** boxer style garments; they were not drafted with women's garments in mind. Their use in the analysis portion of HQ 951754 was an error.

Customs intends to modify HQ 951754, in part, to reflect the proper analysis. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter (HQ) 957133, is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 21, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 25, 1992.

CLA–2 CO:R:C:T 951754 SK
Category: Classification
Tariff No.: 6204.62.4055

STEPHEN M. ZELMAN
ATTORNEY AT LAW
100 East 42nd Street, 22nd floor
New York, NY 10017

Re: Classification of 100% cotton flannel women's boxer-style shorts; outerwear *v.* sleepwear; multiple-use garment; importer must provide evidence that article is designed, marketed and sold as claimed; availability in intimate apparel department not conclusive; 6204, HTSUSA; *Mast Industries, Inc. v. United States; Hampco Apparel, Inc. v. United States; St. Eve International, Inc. v. United States;* HRL 082118 (5/20/88).

DEAR MR. ZELMAN:

This is in response to your inquiry of May 4, 1992, on behalf of Craftex Creations, Inc., requesting the tariff classification and textile category applicable to a garment described as a women's boxer-style short. A sample was submitted to this office for examination.

Facts:

The submitted sample, marked style 12061D, is a pair of women's boxer-style shorts constructed from woven 100% cotton flannel yarn-dyed plaid fabric. The pull-on shorts feature a fully elasticized waist with a turned waistband, fly front opening secured by a single visible button, single center back seam and hemmed mid-thigh length legs. The garment's relaxed waist measures approximately 22 inches. the garment's leg opening measures approximately 27.5 inches in circumference.

Your submission refers to the garment as "boxer-style sleepwear". You claim that District Decision (DD-San Francisco) 873141, dated April 20, 1992, prohibits importation of the merchandise because your client cannot obtain the textile quota category required by the ruling. DD 873141 classified the subject merchandise as women's or girls' cotton shorts under subheading 6204.62.4055, HTSUSA, with a textile category of 348.

Issue:

Whether the women's flannel boxer-style shorts are properly classifiable as sleepwear under heading 6208, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), or as women's shorts under heading 6204, HTSUSA?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRI's) taken in order. GRI 1 provides that classification shall be in accordance with the terms of the headings and any relative section or chapter notes.

The subject merchandise is of a type of garment that is capable of being used for more than one purpose. Use of this article both as shorts and as sleepwear is feasible and it is this duality which complicates classification. When confronted with garments which are claimed to be of a particular class, yet strongly resemble articles of another class, Customs will first examine the article itself and its particular design features and thereafter any other extrinsic evidence pertaining to the marketing, advertising and sale of the article. Customs will also consider information regarding what the garment passes for in the trade and commerce of the United States and what the expectations of the ultimate purchaser are. *See St. Eve International, Inc. v. United States,* Slip. Op. 87–37 (1987). *See also* Headquarters Ruling Letter (HRL) 082118, dated May 20, 1988, which sets forth Customs' approach to the classification of ambiguous articles sold in an ambiguous sales environment.

In the instant case, Customs is asked to classify a women's woven 100% cotton flannel boxer-style short. Customs has developed guidelines which aid in distinguishing between underwear boxer shorts and outerwear boxer shorts. *See* HRL 087940, dated September 16, 1991. Although the distinction made in that case was between outerwear and under-

wear, as opposed to the instant case where we are to determine whether the garment is outerwear or sleepwear, the criteria set forth in HRL 087940 nevertheless provides the relevant analysis because neither sleepwear nor underwear are worn as outerwear and both are garments to be worn in the privacy of one's own home. Outerwear may be worn to bed (i.e., t-shirts), but this is a fugitive use and not a basis for classification. Sleepwear, like underwear, is not worn as outerwear.

In HRL 087940, Customs deemed the following characteristics determinative of outerwear:

1. Fabric weight greater than 4.2 ounces per square yard;
2. An enclosed or turned waistband;
3. Lack of a fly or presence of a lining;
4. A single leg opening greater than the relaxed waist;
5. The presence of belt loops, inner or outer pockets or pouches;
6. Multiple snaps at the fly opening;
7. The side length of a size medium should not exceed 17 inches.

The subject merchandise possesses two of the above-enumerated features: the garment has a turned waistband and the circumference of a single leg opening measures 27.5 inches and is therefore greater than the waist's circumference which measures 22 inches. No information regarding the fabric weight of this garment was submitted to this office. The presence of more than one of these features gives rise to a rebuttable presumption that a garment is outerwear. As mentioned, additional criteria such as marketing, advertising, industry treatment of this garment and other physical attributes of the garment may be considered to refute this presumption.

In your submission you state that this garment is designed, manufactured, marketed and used as sleepwear. You cite *Mast Industries, Inc. v. United States,* Slip Op. 85–114 (1985) and *St. Eve International, Inc. v. United States,* Slip Opinion 87–37 (1987) in support of your claim. No conclusive evidence was submitted which substantiates this claim. As set forth above, the design characteristics of this garment create a rebuttable presumption that the garment is outerwear. With regard to the marketing and advertising of this particular article, the only information submitted to this office consisted of a written statement that a back-to-school catalogue will carry these articles on the *sleepwear* page (no photo or advertising copy was provided) and the store where these items will be sold (Target Stores) will display the garments in the intimate apparel section. In a contradictory subsequent statement provided by the intimate apparel buyer of Target Stores, it was stated that the shorts will be displayed in the *panty and daywear* section and will be *marketed for wear underneath skirts and shorts.* Obviously, this is not how sleepwear is worn and there is discrepancy in the manner in which these garments are advertised and displayed in the store. In a phone conversation with the buyer, Customs was also informed that the garments will be sold on racks which have a photo topper showing a model wearing the subject merchandise with a T-shirt and a robe. Therefore, from a single source we have been told that the garment will be advertised as sleepwear, yet displayed with panties and daywear, and have accompanying photos in the underwear section showing the article worn with outerwear and a robe.

In your June 22, 1992, submission to this office, you have provided us with sleepwear advertisements from several other stores. While Customs will take into consideration evidence of how certain articles are being treated in the industry, the articles must be the same as those under consideration for there to be any relevance to the comparison. You submitted a MACY'S ad which shows polyester "satin boxers" positioned on the same page with other sleepwear and underwear. You also submitted ads from VICTORIA'S SECRET and LORD & TAYLOR which show women wearing shorts and matching top sets described as "boxer pajama sets". The satin boxers are not similar to the articles at issue because they are made from a different fabric and the sheerness and design features of that style may render them unsuitable for use as outerwear. The "boxer pajama sets" are also different from the articles at issue in that they are polyester two-piece sets clearly designed to be worn together and they are unambiguously marketed as "pajamas". While the ads use the term "boxer" to describe the sleepwear, this term alone is not absolutely determinative of classification as either sleepwear or underwear.

The mere fact that the subject merchandise will be displayed in the intimate apparel department of a large store that also carries outerwear does not conclusively prove that the garment is either sleepwear or underwear. It is well established that intimate apparel departments include merchandise other than intimate apparel. In fact, virtually any issue

of *BODY FOUNDATIONS AND INTIMATE APPAREL*, the trade publication for the intimate apparel business, will demonstrate that intimate apparel departments market a wide variety of "leisurewear" (i.e., loose, comfortable clothing worn in or outside the home in a casual environment). This fact is verified by a statement by the intimate apparel buyer from Target Stores who acknowledges that her department carries outerwear sundresses.

Furthermore, Customs notes that while the use of flannel fabric has traditionally been associated with sleepwear, it is not exclusively limited for this purpose. Certainly flannel is acceptable as an outerwear fabric, as is evidenced by its commonplace use in flannel shirts.

You assert that Craftex' line of clothing is limited to women's sleepwear, its location is in Manhattan's nightwear/sleepwear district and that outerwear buyers do not visit Craftex' premises. Customs has rejected claims that imported merchandise should be classified based solely on how a company characterizes itself, its product line or where it locates its business. Absent substantive evidence based on design characteristics, marketing, advertising and manner of sale to indicate otherwise, we are unwilling to classify these garments as sleepwear based on the information submitted.

Article such as these are offered for sale in various retail environments and, when offered in the intimate apparel department, are often casually displayed with other leisurewear and combined with casual upper body garments which are clearly outerwear. As mentioned *supra*, Customs will take into consideration evidence of how these garments are treated in the fashion industry. We note in particular an advertisement for boxer shorts found in *BODY FOUNDATIONS AND INTIMATE APPAREL* magazine, which reads:

> Boxer shorts become a natural for spring/summer lounging and sleeping. They are comfortable and practical as well, making the transition from the house to the streets with ease.

The other advertisement is from a *JC PENNEY CATALOGUE* and describes boxers as leisurewear.

We are of the opinion that the submitted sample is a multiple use garment intended as a comfortable and casual lounging garb that may be worn inside and outside the home. The garment has the physical characteristics of outerwear and may be worn outside. The garment is not sleepwear and we are not persuaded that any use as sleepwear will exceed all other uses to which this merchandise may be put.

Heading 6204, HTSUSA, provides for, *inter alia*, women's shorts, and the subject merchandise is properly classifiable here.

Holding:

The article at issue is classifiable under subheading 6204.62.4055, HTSUSA, which provides for women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear): of cotton: other* * * shorts: women's. The rate of duty is 17.7% *ad valorem* and the textile category is 348.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that your client check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is updated weekly and is available at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification), and the restraint (quota/visa) categories, your client should contact its local Customs office prior to importing the merchandise to determine the current applicability of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:T 957133 ib
Category: Classification
Tariff No.: 6204.62.4055

STEPHEN M. ZELMAN, ESQ.
100 East 42nd Street, 22nd Floor
New York, NY 10017

Re: Modification of HQ 951754; incorrect use of criteria used in determining whether women's shorts are a non-underwear garment; criteria are for men's boxer style garments only; for women's shorts, heading 6204, HTSUSA, is an *eo nomine* provision with no limiting language regarding use.

DEAR MR. ZELMAN:

On June 25, 1992, this office issued to you, on behalf of your client, Craftex Creations, Inc., HQ 951754, regarding the classification of certain women's woven cotton flannel boxer shorts. We have had occasion to review that ruling and have determined that it is in error, in part, as regards to the analysis. The outcome (for quota and visa purposes) remains unchanged.

Facts:

The merchandise in question, style number 12061D, is a pair of women's boxer-style shorts constructed from woven 100 percent cotton flannel yarn-dyed plaid fabric. The pull-on shorts feature a fully elasticized waist with a turned waistband, fly front opening secured by a single visible button, single center back seam and hemmed mid-thigh length legs. In the analysis, HQ 951754 referred to HQ 087940, dated September 16, 1991, which stated seven characteristics as a guideline to determine whether or not a men's boxer-style garment can be considered underwear.

Issue:

Whether the use of the guidelines set out in HQ 087940 was proper when discussing a women's boxer-style garment?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification will be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI will be applied, taken in order.

HQ 951754 referred to HQ 087940, wherein Customs dealt with the tariff classification of a pair of boxer shorts claimed to be men's underwear. That ruling listed seven features considered indicative of non-underwear garments. Though HQ 087940 created objective criteria to be used as an aid in determining if certain boxer style garments were non-underwear garments, the criteria were created for **men's boxer style garments,** they were not drafted with women's garments in mind. This is further evidenced from the statement in the ruling that "boxer shorts are not worn by women as underwear* * *" This belief has been restated by Customs in several rulings. See, HQ 087922, dated October 2, 1991; HQ 087942, dated October 2, 1991; and, NYRL 894070, dated February 18, 1994.

Thus, the use of the criteria set out in HQ 087940 in analyzing the classification of a woman's pair of boxer shorts in HQ 951754 was in error and should be disregarded. However, additional factors such as marketing and advertising, as well as the garment itself, were utilized in reaching the classification decision in HQ 951754. Those portions of the analysis remain unchanged. By this modification Customs would add the following to the analysis:

Heading 6204, HTSUA, provides for, among other things, women's shorts. Shorts in heading 6204, HTSUSA, is an *eo nomine* provision with no limiting language regarding use. Thus, women's shorts in this heading includes all forms of women's shorts for all uses unless the garment is more specifically provided for elsewhere in the tariff. It is a basic tenet of tariff classification that "an *eo nomine* statutory designation of an article, without limitations or a shown contrary legislative intent, judicial decision, or administrative prac-

tice to the contrary, and without proof of commercial designation, will include all forms of said article." *Nootka Packing Co. et. al. v. United States,* 22 CCPA 464, 470, T.D. 47464 (1935).

This office acknowledges the fact that current fashion trends have dictated that it is fashionable for women to wear boxer shorts as outerwear shorts on the streets. This use is also well recognized in the trade. A review of articles on boxer shorts and their use by women supports the position taken by Customs that women in the United States Wear boxer shorts principally as outerwear shorts. In 1988 an article in the *New York Times,* Section B, p.6, dated July 12, 1988, titled "Boxer Shorts Meet the Sun", stated: "Boxer shorts-also having a big revival with men-have found new popularity as street wear for women." In yet another article, the *New York Times,* Section 1, Part 2, p.34, dated January 28, 1990, reported on the underwear designer Nicholas Graham, under the headline "Style Makers; Nicholas Graham: Underwear Designer". The writer commented that sales of boxer shorts to women as outerwear accounted for 50 percent of the sales by Mr. Graham's company.

As regards the subject garment, the type of fabric and the design and construction of the garment make it likely that women will wear this garment as outerwear shorts. In addition, and as has been explicitly discussed, there is insufficient proof submitted by you, in the way of marketing and advertising to refute the presumption that the garment is an outerwear garment.

Accordingly, based on the arguments put forth above, the garment is classified as women's shorts in heading 6204, HTSUSA.

Holding:

The women's boxer-style shorts, referenced Style number 12061D, are classified in subheading 6204.62.4055, HTSUSA, which provides for, *inter alia,* women's shorts. There is no change for quota and visa purposes.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROCEDURES IF THE GENERALIZED SYSTEM OF PREFERENCES PROGRAM EXPIRES

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: The Generalized System of Preferences (GSP) is a preferential trade program that allows the products of many developing countries to enter the United States duty free. The GSP is currently scheduled to expire at midnight on July 31, 1995, unless its provisions are extended by Congress. This document provides notice to importers that claims for duty-free treatment under the GSP may not be made for merchandise entered or withdrawn from a warehouse on or after August 1, 1995, if the program is not extended before that date. The document also sets forth mechanisms to facilitate refunds, if the GSP is renewed retroactively.

DATE: The plan set forth in this document will become effective as of August 1, 1995, if Congress does not extend the GSP program before that date.

FOR FURTHER INFORMATION CONTACT: For specific questions relating to the Automated Commercial Systems: Irv Fisher, Office of Automated Commercial System, 202–927–1220. For general operations questions:

Formal entries	Lisa Crosby, 202–927–0163
Informal entries	Debi Rutter, 202–927–1847
Mail entries	Dan Norman, 202–927–0542
Passenger claims	Robert Jacksta, 202–927–1311

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 501 of the Trade Act of 1974 (the Act), as amended (19 U.S.C. 2461) authorizes the President to establish a Generalized System of Preferences (GSP) to provide duty-free treatment for eligible articles imported from designated beneficiary countries. Beneficiary developing countries and articles eligible for duty-free treatment under the GSP are designated by the President by Presidential Proclamation in accordance with sections 502(a) and 503(a) of the Act (19 U.S.C. 2462(a) and 2463(a)). Pursuant to 19 U.S.C. 2465(a), as amended by section 601 of the Uruguay Round Agreements Act, 19 U.S.C. 2465 note, Pub.L. 103–465, 108 Stat. 4990 (1994), duty-free treatment under the GSP is presently scheduled to expire on July 31, 1995.

Congress is currently considering whether to extend the GSP program. If legislation is enacted but does not become law before the GSP expires, language may be included that would renew the GSP retroactively to the date of its presently scheduled expiration and Customs will

need to reliquidate numerous entries to make refunds of duties collected. However, if Congress does not pass legislation renewing the GSP before midnight, July 31, 1995, no claims for duty-free treatment under the program may be allowed on entries made after that time.

Recognizing the impact that retroactive renewal and consequent numerous reliquidations would have on both importers and Customs, Customs has developed a mechanism to facilitate refunds, should GSP be renewed retroactively. Set forth below is Customs plan that will be implemented on August 1, 1995, if the GSP has not been extended by that date.

FORMAL ENTRIES

CLAIMS—DUTIES MUST BE DEPOSITED

No claims for duty-free treatment under the GSP may be made for merchandise entered, or withdrawn from warehouse for consumption on or after August 1, 1995. Duties at the most-favored-nation rate must be deposited, or a claim may be made under another preferential program for which the merchandise qualifies (for example, the Andean Trade Preference Act, the Caribbean Basin Initiative, or the U.S.–Israel Free Trade Area Agreement).

While estimated duties must be deposited, all filers who file entry summaries through the Automated Broker Interface (ABI) may continue to file using the Special Program Indicator (SPI) for the GSP (the letter "A") as a prefix to the tariff number for all entries that would have qualified for the GSP if the GSP were still in effect. Customs Automated Commercial System (ACS) will be reprogrammed to accept the SPI "A" with the payment of duty.

Filers using the ABI may reprogram their software so that the SPI "A" can still be used as a prefix to the tariff number, but with the payment of duty. While reprogramming is strictly voluntary, continued use of the SPI "A" has some benefits. One benefit of continued use of the SPI "A" is that the filer will not have to write a letter to Customs requesting a refund if the GSP is renewed with retroactive effect. Use of the SPI "A" will enable Customs to identify affected line items and refund duties without a written request from the importer. In other words, after July 31, 1995, the SPI "A" will constitute an importer's request for a refund of duties paid for GSP line items, should GSP renewal be retroactive. Other benefits are that ACS will perform its usual edits on the information transmitted by the filer, thereby ensuring that GSP claims are for acceptable country/tariff combinations and eliminating the need for numerous statistical corrections.

This plan was used when the GSP expired on September 30, 1994, and was later renewed with retroactive effect by section 601 of the Uruguay Round Agreements Act, Pub.L. 103–465, 108 Stat. 4990 (1994). Customs Headquarters developed a computer program that identified entries made using the SPI "A" while the program was lapsed and was able to process most refunds without requiring further action by the importer. Refunds were delayed somewhat while the program was

being written and de-bugged. Customs intends to use the same program this year if the GSP is renewed with retroactive effect and believes it is the most efficient way to process large numbers of refunds quickly.

Filers who do not wish to reprogram will be required to request refunds in writing if the GSP is renewed retroactively, identifying the affected entry numbers.

ABI filers continuing to use the SPI "A" may use it as they do now (for example, for warehouse entries and for formal consumption entries).

Importers may not use the SPI "A" if they intend to later claim drawback. Use of the SPI "A" is the importer's indication that he wishes to receive a refund if the GSP is renewed retroactively. To claim both this refund and drawback would be to request a refund in excess of duties actually deposited. Importers who are unsure as to whether they will claim drawback are advised not to use the SPI "A". If the GSP is renewed retroactively, and they have not yet claimed drawback, they may request a refund by writing to the district director at the port of entry. If the GSP is not renewed retroactively, they will still have the option of filing a drawback entry.

Continued use of the SPI "A" is not available to non-ABI filers.

STATISTICS

For statistical purposes, ACS will internally convert any "A" transmitted via ABI after July 31, 1995 into a "Q". If the GSP is renewed retroactively to that date, Census will convert all "Q" statistics into "A" statistics, thereby ensuring that next year's competitive need limitations under the GSP are accurate. This will also vastly reduce the number of statistical corrections that must be done by import specialists.

REFUNDS

If the GSP is renewed with retroactive effect, Customs will reliquidate all affected ABI entry summaries with a refund for the GSP line items. Field locations shall not issue GSP refunds except as instructed to do so by Customs Headquarters.

If a filer files an ABI entry summary with the SPI "A", no further action will need to be taken by the filer to request a refund; filing with the SPI "A" constitutes a valid claim for a refund. Refunds for summaries filed without the SPI "A" must be requested in writing. Instructions on how to request a refund in writing will be issued if the GSP is renewed with retroactive effect.

INFORMAL ENTRIES

Refunds on informal entries filed via ABI on a Customs Form 7501 with the SPI "A" will be processed in accordance with the procedures outlined above.

BAGGAGE DECLARATIONS AND NON-ABI INFORMALS

When merchandise is presented for clearance, travellers and importers will be advised verbally or with a written notice that they may be eligible for a refund of GSP duties.

Travellers/importers may write a statement directly on their Customs declarations (CF 6059B) or informal entries (CF 363 or CF 7501) indicating their desire for a refund. If GSP duty-free status is reenacted with a retroactive provision, no further action to obtain a refund will be required on the part of the importer who has written such a statement. Failure to request a refund in this manner does not preclude them from making a timely request in the future.

MAIL ENTRIES

A written notice will be sent to the addressees with the CF 3419A (Mail Entry) informing them that they may be eligible for a refund of GSP duties.

The addressees may submit a claim requesting a refund of GSP duties and return it, along with a copy of the CF 3419A to the appropriate International Mail Branch (address listed on bottom right hand corner of CF 3419A). It is essential that a copy of the CF 3419A be included as this will be the only method of identifying GSP products and ensuring that duties and fees have been paid.

Dated: June 28, 1995.

PHILIP METZGER,
Acting Assistant Commissioner,
Field Operations.

[Published in the Federal Register, July 5, 1995 (60 FR 35103)]

PERFORMANCE REVIEW BOARDS APPOINTMENT OF MEMBERS

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: General notice.

SUMMARY: This Notice announces the appointment of the members of the United States Customs Service Performance Review Boards (PRB's) in accordance with 5 U.S.C. 4313(c)(4). The purpose of the PRB's is to review senior executives' performance appraisals and make recommendations regarding performance appraisals and performance awards.

EFFECTIVE DATE: July 1, 1995.

FOR FURTHER INFORMATION CONTACT: Bob Smith, Director, Office of Personnel, Office of Human Resources, United States Customs Service, Post Office Box 636, Washington, DC 20044; telephone (202) 634–5270.

BACKGROUND

There are two (2) PRB's in the U.S. Customs Service.

Performance Review Board 1:

The purpose of this Board is to review the performance appraisals of senior executives rated by the Commissioner or Deputy Commissioner of Customs. The members are:

W. Ralph Basham, Assistant Director, Office of Administration, U.S. Secret Service
Daniel R. Black, Associate Director, Office of Compliance Operations, Bureau of Alcohol, Tobacco & Firearms
John C. Dooher, Director, Washington Center, Federal Law Enforcement Training Center General Office
William H. Gillers, Director, Office of Management Advisor Services, Department of the Treasury
John W. Mangels, Associate Director, Office of Management /CFO, Financial Crimes Enforcement Network

Performance Review Board 2:

The purpose of this Board is to review the performance appraisals of all senior executives *except* those rated by the Commissioner or Deputy Commissioner of Customs. All are Assistant Commissioners or Regional Commissioners of the U.S. Customs Service. The members are:

Assistant Commissioners:

Samuel H. Banks, Office of Field Operations
Walter B. Biondi, Office of Investigations
Douglas M. Browning, Office of International Affairs
Edward F. Kwas, Office of Strategic Trade
William F. Riley, Office of Information and Technical Services
Deborah J. Spero, Human Resources Management
Homer J. Williams, Office of Internal Affairs
Vincette Goerl, Office of Finance
Stuart P. Seidel, Office of Regulations and Rulings

Regional Commissioners:

Philip W. Spayd, Northeast Region
Anthony N. Liberta, New York Region
Garnet J. Fee, North Central Region
J. Robert Grimes, South Central Region
Robert S. Trotter, Southwest Region
Robert McNamara, Southeast Region
Rudy Camacho, Pacific Region

Dated: June 28, 1995.

MICHAEL H. LANE,
Acting Commissioner of Customs.

[Published in the Federal Register, July 5, 1995 (60 FR 35104)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–113)

ARAMIDE MAATSCHAPPIJ V.O.F. AND AKZO FIBERS INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND E.I. DU PONT DE NEMOURS AND CO., INC., DEFENDANT-INTERVENOR

Court No. 94–07–00424S

[Determination of the International Trade Commission sustained.]

(Dated June 19, 1995)

Adduci, Mastriani, Schaumberg, Meeks & Schill, L.L.P. (*Thomas M. Schaumberg, Barbara A. Murphy* and *Gregory C. Anthes*) for plaintiffs.

Lyn M. Schlitt, General Counsel, *James A. Toupin*, Deputy General Counsel, Office of the General Counsel, United States International Trade Commission (*Marc A. Bernstein*) for defendant.

Wilmer, Cutler & Pickering (*John D. Greenwald, Ronald I. Meltzer* and *Stuart M. Weiser*) for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter is before the court on a motion for judgment upon the agency record pursuant to USCIT Rule 56.2. The motion has been brought by Aramid Products V.o.F. (formerly Aramide Maatschappij V.O.F.) and Akzo Nobel Fibers Inc. (formerly Akzo Fibers Inc.) (collectively "Akzo"), challenging the determination of the United States International Trade Commission (the "Commission") in *Aramid Fiber Formed of Poly Para-Phenylene Terephthalamide from the Netherlands*, USITC Pub. 2783, Inv. No. 731–TA–652 (June 1994) (affirmative final determ.) ("*Final Det.*").

BACKGROUND

On July 2, 1993, E.I. Du Pont de Nemours & Co., Inc. ("petitioner" or "Du Pont") filed a petition with the Commission and the International Trade Administration of the United States Department of Commerce ("Commerce"), alleging that an industry in the United States was materially injured or threatened with material injury by reason of less than fair value ("LTFV") imports of poly para-phenylene terephthalamide

("PPD-T aramid fiber") from the Netherlands. Du Pont is the sole U.S. producer of PPD-T aramid fiber, which is a high-performance synthetic fiber with special characteristics that include high strength, resistance to deformation from stretch, high thermal stability, fire resistance, and chemical resistance. PPD-T aramid fiber is available in a variety of forms, such as filament yarn, staple, pulp, floc, chopped fiber, and nonwovens.[1] It is distinguished from other types of fiber by its chemical composition, specific properties, method of production, and range of end uses. *Final Det.* at II–5. Commerce issued its final determination on May 6, 1994, concluding that PPD-T aramid fiber imports from the Netherlands were being, or were likely to be, sold in the United States at LTFV. 59 Fed. Reg. at 23,684. Akzo was the only respondent involved in the investigation. In its final determination, the Commission concluded that the domestic PPD-T aramid fiber industry was materially injured by reason of the LTFV imports from the Netherlands.[2] *Aramid Fiber Formed of Poly Para-Phenylene Terephthalamide from the Netherlands,* 59 Fed. Reg. 32,220 (USITC 1994) (final). Akzo challenges the Commission's determination that the product under investigation consisted of a single like product, and that the subject imports were a cause of material injury to the domestic industry. Defendant and petitioner oppose Akzo's motion.

Standard of Review

In reviewing final determinations in antidumping duty investigations, the court will hold unlawful those determinations of the Commission found to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988) (current version at 19 U.S.C.A. § 1516a(b)(1)(B)(i) (West Supp. 1995)).

Discussion

I. *Like Product:*

The statute defines "like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation." 19 U.S.C. § 1677(10) (1988). Factors that the Commission typically considers in defining "like product" include (1) physical characteristics and uses, (2) interchangeability of the products, (3) channels of distribution, (4) customer and producer perceptions of the products, (5) the use of common manufacturing facilities and personnel, and (6) price. *See Calabrian Corp. v. United States,* 16 CIT 342, 346 n.4, 794 F. Supp. 377, 382 n.4 (1992). The bases upon which a like product determination is made "fall [ ] within the Commis-

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[1] Commerce determined that the product under investigation consisted of a "single class or kind of merchandise":

> PPD-T aramid in the form of filament yarn (including single and corded), staple fiber, pulp (wet or dry), spun-laced and spun-based nonwovens, chopped fiber and floc. Tire cord fabric is excluded from the class or kind of merchandise under investigation.

Aramid Fiber Formed of Poly-Phenylene [sic] Terephthalamide from the Netherlands, 59 Fed. Reg. 23,684, 23,685 (Dep't Comm. 1994) (final determ. of LTFV sales). Commerce further found three "such or similar" product categories: yarn, staple fiber and pulp. *Id.*

[2] Commissioner Bragg did not participate in the determination.

sion's broad discretion and expertise in conducting investigations." *Chung Ling Co. v. United States*, 16 CIT 636, 647, 805 F. Supp. 45, 54 (1992). Further, the Commission seeks clear dividing lines among possible like products and generally disregards minor variations. *Nippon Steel Corp. v. United States*, Slip Op. 95–57, at 11 (Apr. 3, 1995).

Akzo challenges the Commission's determination that PPD-T aramid fiber constituted a single like product, arguing that the Commission should have found four separate like products corresponding to four major forms of PPD-T aramid fiber—yarn, staple fiber, pulp and nonwovens. The court addresses Akzo's challenges according to the factors typically considered by the Commission in making its like product determination.

A. Physical characteristics and uses:

In its final determination, the Commission found that all forms of PPD-T aramid fiber have similar physical and structural characteristics, in that they are produced from the same raw materials and have the same chemical composition. *Final Det.* at I–6. Further, processing steps required to make the various downstream forms of PPD-T aramid fiber[3] do not alter the molecular organization of the material. *Id.* The Commission noted that physical differences exist among the various forms of PPD-T aramid fiber, thus many forms are "more appropriate for specific end-use applications." *Id.* The Commission further found that physical differences also exist within the four product groupings identified by Akzo. *Id.* Notwithstanding these differences, the Commission determined that

> it is significant that functions of PPD-T aramid fiber products frequently overlap among fiber forms and across applications. Information submitted by the parties indicates that PPD-T aramid fiber products in the forms of yarn, pulp, and staple are all used to deliver strength in their end-use applications. Products in the form of pulp, staple, and nonwovens are all used to impart thermal stability or insulation.

Id. Finally, the Commission concluded that generally common physical characteristics and product qualities distinguish aramid fibers from other fibers. *Id.* at I–8.

Akzo contends that the significant physical differences and specific end-use applications among the various forms does not support a single like product finding. Akzo also contests the Commission's conclusion that shared characteristics and functions distinguished PPD-T aramid fiber from other non-aramid fibers, on the basis that the Commission made no findings concerning the physical characteristics and product qualities of these other fibers. According to Akzo, evidence in the record of "inter-fiber" competition undermines the Commission's conclusion.

The shared physical characteristics and product qualities among the various PPD-T aramid fiber forms support the Commission's single like

[3] Further processing steps are required to convert PPD-T aramid yarn into the various downstream product forms of staple, pulp and nonwovens. *Final Det.* at I–6.

product finding. The Commission acknowledged the physical differences and specific end-use applications among the various PPD-T aramid forms, but found that these differences did not outweigh the products' shared functions and characteristics. Additionally, Akzo, in general, does not dispute that PPD-T aramid fiber has important shared characteristics and qualities.

Contrary to Akzo's second contention, the court finds that evidence in the record supports the Commission's conclusion that PPD-T aramid fiber is distinguished from other non-aramid fibers by its shared characteristics and qualities. Although Akzo correctly asserts that other fibers substitute for PPD-T aramid fiber in many applications, the record indicates that PPD-T aramid fiber dominates the market for high performance fibers (with the exception of carbon fibers). *See Final Det.* at II–9. Further, in most applications where PPD-T aramid fiber is used, "highly-specialized products * * * have been engineered around the characteristics of this fiber." *Id.* Also, in general, "when alternative materials are used [in place of PPD-T aramid fiber], the performance and the cost are lowered." *Id.* at II–30. Thus, the Commission adequately considered the role of other fibers.

B. Interchangeability of the products:

The Commission determined that there was limited interchangeability among the various forms of PPD-T aramid fiber, noting that the majority of purchasers of the subject merchandise indicated "they could not use more than one fiber type for their end-use applications." *Id.* at I–7. The Commission further found that these same purchasers indicated interchangeability was "also limited *within* the individual aramid fiber forms." *Id.* Despite the lack of interchangeability, the Commission concluded that the common characteristics of PPD-T aramid fiber warranted a single like product finding.

Akzo contends that the Commission's reliance on the lack of interchangeability *within* the various PPD-T aramid forms in support of its like product determination was erroneous and inconsistent with past Commission precedent. Akzo argues that the lack of interchangeability within each PPD-T aramid fiber form is irrelevant to a finding of separate like products. In support of its contention, Akzo cites *Certain Flat-Rolled Carbon Steel Prods. from Various Countries,* USITC Pub. 2664, Inv. Nos. 701–TA–319–332, 334, 336–342, 344, and 347–353, and Inv. Nos. 731–TA–573–579, 581–592, 594–597, 599–609, and 612–619, at 11–12 & n.13 (Aug. 1993) (final determs.), and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Various Countries,* USITC Pub. 2185, Inv. Nos. 303–TA–19 and 20, and Inv. Nos. 731–TA–391–399, at 16–17, 33 (May 1989) (final), where the Commission found separate like products despite limited interchangeability within each like product grouping.

The court finds no error in the Commission's finding that limited interchangeability within the PPD-T aramid fiber forms supported its conclusion that no clear dividing lines existed among the various aramid

products. The point is that the interchangeability test provides no clear-cut lines among products in such a situation. Further, contrary to Akzo's contention, the Commission did not rely solely on this finding to support its single like product determination. Rather, the Commission found that, *inter alia*, the common characteristics of the different aramid forms supported single like product treatment, notwithstanding the limited interchangeability among forms or products within forms.[4]

C. Use of common manufacturing facilities and personnel:

In its final determination, the Commission found that the production process for aramid yarn was common to all forms of PPD-T aramid fiber, observing that additional production steps were applied to aramid yarn to produce staple, pulp and nonwovens. *Final Det.* at I–7; *see supra* note 3. The Commission noted that the additional processing needed for staple and pulp production was performed by Du Pont subcontractors in facilities separate from the one which Du Pont used to produce aramid yarn.[5] Nevertheless, the Commission found that yarn production workers constituted "a substantial majority of all PPD-T aramid fiber production workers in the United States." *Id.* Further, the Commission determined that yarn production made up a substantial majority of the total value of staple, pulp and nonwoven products.[6] *Id.* This is not an inconsequential factor.

Akzo does not challenge the factual findings made by the Commission, but asserts that even though staple, pulp and nonwovens share the yarn production process, this finding fails to support the conclusion of no clear dividing lines among the various PPD-T aramid product forms. According to Akzo, the additional production processes for the downstream products warrant a separate like product determination.[7]

The court does not find error in the Commission's consideration of the significant yarn production integral to the manufacture of the downstream aramid products. Although certain facilities and workers are

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[4] In fact, at oral argument, petitioner indicated that for certain end-use applications, such as brakes and gaskets, there was interchangeability among the various aramid product forms during the "designing-in" phase. For example, a customer is able to choose between pulp or staple for the manufacture of brake and gasket products, even though as final end-use products, interchangeability is limited. *See Final Det.* at II–6; U.S. Int'l Trade Comm'n, *Aramid Fiber Formed of Poly Para-Phenylene Terephthalamide: Staff Report to the Commission*, List 2, Doc. 38, at I–70–I–71 ("*Conf. Staff Rpt.*").

[5] Akzo correctly contends that Du Pont manufactured nonwovens in facilities and with workers distinct from those used to manufacture aramid yarn. *See* Du Pont's Questionnaire Response, List 2, Doc. 40.10, at 35E. Yarn for nonwovens, however, was still produced at the same plant in which the remainder of aramid yarn was produced. *See Final Det.* at II–13 n.55; *Conf. Staff Rpt.* at I–24.

[6] Akzo contests the value-added figure for nonwoven production relied upon by the Commission, asserting that yarn production accounted for a lower percentage of the total value of nonwoven products. At oral argument, defendant explained that any discrepancy was due to use of average cost of production figures and adjustment for yield losses. *See Conf. Staff Rpt.* at I–27, fig. 2 & n.4. Both parties admit, however, that the percentage change is not significant.

[7] Akzo also asserts that the Commission's separate determinations for rayon filament yarn and rayon staple fiber, support its contention that separate like product determinations are warranted in this case. *See High-Tenacity Rayon Filament Yarn from Germany*, USITC Pub. 2525, Inv. No. 731–TA–530 (June 1992) (final); *Rayon Staple Fiber from France and from Finland*, USITC Pub. 938, Inv. Nos. AA1921–190 and AA1921–191 (Feb. 1979) (final). According to Akzo, the production processes involved here are used similarly to the manufacture rayon staple fiber from rayon yarn.

Contrary to Akzo's contention, however, the court does not find that the Commission's rayon fiber determinations establish that "yarn and staple fiber textile products are separate like products." Pls.' Mem. Supp. Mot. J. Upon Agency R. at 43. The rayon determinations involved one product form. Neither the "class or kind" scope determination by Commerce nor the arguments of the parties required the Commission to consider whether other product forms should have been included in the like product determinations for rayon yarn and rayon staple fiber. *See Rayon Filament Yarn*, USITC Pub. 2525, at 6; *Rayon Staple Fiber*, USITC Pub. 938, at 3.

dedicated to production of the downstream forms, with the exception of nonwovens, the value added by these additional production processes is small. *See Conf. Staff Rpt.* at I–27, fig. 2. Further, separate nonwoven production workers account for less than 1% of all domestic PPD-T aramid fiber production workers in 1993. *See id.*, App. D, at D–9. Thus, the Commission's consideration of the substantial yarn production processes involved in PPD-T aramid manufacture was reasonable.

D. Producer and customer perceptions of the products:

The Commission found that Du Pont maintained a single marketing operation for domestic sales of the various forms of PPD-T aramid fiber, and that the various products were marketed under a single proprietary name, Kevlar®. *Final Det.* at I–7. The Commission determined that these facts supported the conclusion that "the U.S. producer perceives aramid fiber to be a single like product." *Id.*

Akzo contends that the Commission's reliance on producer perceptions of the subject merchandise is unsupported by substantial evidence.[8] Specifically, Akzo argues that Du Pont's questionnaire response and annual reports support it's contention that Du Pont markets nonwovens separately from other aramid fibers. Du Pont's questionnaire response bears out this conclusion, reflecting that Kevlar® nonwovens were marketed under a separate business unit. *See* Du Pont's Questionnaire Response, List 2, Doc. 40.10, at 35E. Du Pont's annual reports similarly refer to certain nonwoven products separately from the other Kevlar® aramid forms, although it is unclear whether Kevlar® nonwoven products are included in that reference. *See, e.g.*, Du Pont's 1993 Annual Rep., List 1, Doc. 110WW(2), at 11 (listing "Sontara, "Tyvek" and "Typar" nonwoven products). Du Pont admits that its Kevlar® nonwoven products were manufactured and marketed under a separate business unit, but argues that these operations come under an umbrella business unit that also markets the other Kevlar® aramid product forms.

In its final determination, the Commission did not address Du Pont's particular marketing scheme for its Kevlar® nonwovens. Instead, the Commission relied upon hearing testimony and a post-hearing affidavit in support of its conclusion that the various aramid fibers were marketed under a single marketing scheme.[9] *Final Det.* at I–7 n.21. Although the evidence in the record supporting these declarations is not particularly strong, it is clear that the nonwovens at issue are marketed under the name Kevlar®, even if a different business subunit is employed. It is within the Commission's discretion to weigh conflicting

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[8] Akzo further asserts that the Commission's reliance on producer perceptions is not permitted under the statute. This argument is without merit. This court has repeatedly sanctioned the Commission's analysis of the various like product factors, including producer perceptions of the products at issue. *See, e.g., Calabrian Corp.*, 16 CIT at 346 n.4, 794 F. Supp. at 382 n.4. The court finds no conflict with the statute with regard to consideration of this factor. *See* 19 U.S.C. § 1677(10).

[9] An official at Du Pont testified that "[a]lthough [Kevlar®] is sold in different forms and into many different applications and markets, it is in fact one business." List 1, Doc. 109, at 25. Another official submitted a post-hearing affidavit, stating that "[a] single marketing and sales organization is responsible for the sales and market development activities for all four product forms." List 2, Doc. 28, Ex. I, Aff. 2, at 1. Contrary to Du Pont's suggestion, the post-hearing affidavit does not identify the umbrella business unit under which all Kevlar® products are marketed.

evidence, and the court finds the Commission's conclusion to be based on substantial evidence. *See, e.g., Chung Ling,* 16 CIT at 648, 805 F. Supp. at 55 ("[I]t is not the province of the courts to * * * reweigh or judge the credibility of conflicting evidence."); *Iwatsu Elec. Co. v. United States,* 15 CIT 44, 47, 758 F. Supp. 1506, 1509 (1991).[10]

The Commission also was not persuaded by Akzo's assertion that customers perceived the different forms of aramid fiber as different like products. The Commission stated that

> the customer declarations [Akzo] has submitted to support this contention are at best ambiguous. Some of the declarations refer to 'aramid fiber' as a type of product, and discuss the merits of 'aramid fiber' (as opposed to, for example, 'aramid yarn' or 'aramid staple') *vis à vis* other types of fibers.

Final Det. at I–7 n.27. Akzo contends that the Commission misconstrued the two customer affidavits Akzo submitted.

Contrary to Akzo's contention, however, it is not clear that in the first affidavit, the affiant's use of the term "aramid fiber" unambiguously refers to aramid yarn. *See* List 2, Doc. 11, at Ex. B. Similarly, in the second affidavit, the affiant, although previously mentioning specific aramid fiber products, used "aramid fiber" in a general context without reference to a specific type of aramid product. *See* List 2, Doc. 11, at Ex. E. The court finds no error in the Commission's conclusion that these affidavits were somewhat ambiguous as to the type of product being discussed.

E. Channels of distribution and price:

The Commission determined that all forms of PPD-T aramid fiber had the same channels of distribution, that is, each is sold directly from the manufacturer to the end-user. *Final Det.* at I–7. Akzo does not contest this finding.

The Commission also concluded that widely varying prices "rendered pricing data * * * unmeaningful for evaluating like product treatment for PPD-T aramid fiber." *Id.* at I–8 (footnote omitted). Akzo similarly does not challenge this finding. As price differences do not vary in any predictable way among the fiber forms, this factor supports a single like product finding.

In sum, the Commission determined that PPD-T aramid fiber constituted a single like product, on the basis of its analysis of the factors discussed above: generally common physical characteristics and product qualities, common channels of distribution and largely common production employees. The Commission further found that the differences among the various aramid fiber products did not outweigh "the common product characteristics shared by all forms." *Id.* Finally, although the

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[10] In any event, remand would not be necessary on this issue in any case. Akzo did not produce or import PPD-T aramid nonwoven products during the period of investigation. Thus, a separate like product designation for nonwovens alone would not assist Akzo. Furthermore, a separate like product determination for nonwovens would have insignificant effect upon the Commission's material injury determination, as Du Pont shipments of nonwovens accounted for a very small percentage of Du Pont's total domestic PPD-T aramid fiber shipments. *Conf. Staff Rpt.* at I–36 tbl. 4; *id.,* App. D at D–9; Du Pont's Questionnaire Response, List 2, Doc. 40.10, at 35E.

evidence of producer perceptions of the subject merchandise as a single product is not particularly strong as it relates to nonwovens, the court does not find the Commission's determination on this issue to be unsupported by the record. Taken as a whole, the court finds the Commission's like product determination to be supported by substantial evidence in the record and in accordance with law.[11]

II. *Present Material Injury:*

In making its material injury determination, the Commission

(i) shall consider—

(I) the volume of imports of the merchandise * * *,

(II) the effect of imports of that merchandise on prices in the United States for like products, and

(III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States; and

(ii) may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.

19 U.S.C. § 1677(7)(B) (1988) (current version at 19 U.S.C.A. § 1677(7)(B) (West Supp. 1995)). "Material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant." *Id.* § 1677(7)(A). In its final determination, the Commission concluded that PPD-T aramid fiber imports from the Netherlands were materially injuring the domestic PPD-T aramid fiber industry. *Final Det.* at I–16. Akzo maintains that the Commission's material injury determination is unsupported by substantial evidence.

A. Volume of LTFV imports:

The Commission determined that, despite a slight decline from 1992 to 1993, LTFV imports generally increased during the period of investigation by quantity and value. *Conf. Final Det.*, List 2, Doc. 39, at I–20 ("*Conf. Final Det.*"). As a percentage of total domestic consumption, however, the subject imports by quantity and value increased dramatically during the period. *Id.* at I–21; *see Conf. Staff Rep.* at C–3 tbl. C–1. The market share held by these imports rose from less than 5% in 1991 to more than 15% in 1993. *Conf. Final Det.* at I–21. On the basis of this data, the Commission determined that the volume of LTFV imports, relative to total domestic consumption, was significant. *Final Det.* at I–12.

Akzo contends that the volume of imports was not significant, asserting that quantitative import restrictions imposed by a cross-license agreement[12] entered into between Akzo and Du Pont limited the impact of imports. Specifically, Akzo asserts that its import volumes never

[11] The Commission alternatively determined that a "semifinished product" like product analysis supported the conclusion that a single like product existed for PPD-T aramid fiber. *Final Det.* at I–8 n.31. Commissioner Rohr applied this analysis. *Id.* As the court sustains the Commission's application of the traditional like product analysis, Akzo's challenge to the "semifinished product" like product analysis is not reached.

[12] Akzo and Du Pont entered into a cross-license agreement on May 10, 1988, to resolve long-standing legal disputes over PPD-T aramid fiber process patents. *Conf. Staff Rpt.* at I–5–I–6.

exceeded the quantitative restrictions of the agreement for 1991, or, on an annualized basis, for 1992.[13] Akzo's claim is without merit. First, Akzo's import volumes in 1992 and 1993, following the expiration of the cross-license agreement, significantly exceeded the quantitative restrictions imposed by the agreement. *See Conf. Final Rpt.* at I–6, I–58 tbl. 16. The court does not agree with Akzo's assertion that the cross-license agreement contemplated an extrapolated quantitative restriction for 1992. Further, the Commission considered the quantitative restrictions imposed by the agreement, but concluded that such "voluntary restraints on import volumes do not preclude a finding of material injury by reason of such imports." *See Final Det.* at I–12 n.70. The court finds the Commission's consideration of the significance of Akzo's imports to be reasonable.

B. Effects on prices:

The Commission determined that LTFV imports from the Netherlands suppressed domestic prices to a significant degree. *Id.* at I–14. In support of its conclusion, the Commission relied upon data indicating that there was underselling in 47 of 60 pricing comparisons of end-use purchases of the same products by the same purchasers, and that 11 of 12 purchasers of these products indicated that prices of the subject imports were generally lower than those for the domestic product. *Conf. Final Det.* at I–22-I–23. Additionally, the Commission noted that Akzo's pricing policy for certain customers was designed to undercut Du Pont sales, and that several purchasers specifically switched to Akzo's LTFV imports because of these lower prices. *See id.* at I–27 & n.89. The Commission further found price underselling to be significant in light of the high interchangeability among PPD-T aramid products that have qualified for specific end-use applications. *Final Det.* at I–13-I–14. Based upon these findings, the Commission found LTFV imports to significantly suppress domestic prices.

Akzo contends that the lack of cross-competition among the various PPD-T aramid products, and significant inter-fiber competition, fail to support the conclusion that imports significantly suppressed domestic prices. The Commission, however, recognized that "industrywide pricing data are of limited probative value." *Id.* at I–13 (footnote omitted). Thus, the Commission based its pricing comparisons upon prices charged by Du Pont and Akzo for the same products to the same purchaser. Although Akzo correctly states that interchangeability among the various forms of PPD-T aramid products was limited, the record indicates, and the Commission noted, that Du Pont and Akzo products that qualified for the same specific end-use application, were interchangeable. *Id.* at I–13, II–8, II–29. As this supports the probativeness of the selected pricing comparisons, the court finds no error in the Commission's analysis of the pricing data.

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[13] The quantitative restriction imposed on Akzo's imports for 1992 was effective until expiration of Du Pont's last Kevlar® patent on March 4, 1992. *See* Pls.' Mem. Supp. Mot. J. Upon Agency R. at 52 n.7. In support of its argument, Akzo extrapolated this figure over the span of 1992 to arrive at an annualized quantitative restriction for imports.

Further, the Commission noted that inter-fiber competition was limited by the costs of switching from aramid fiber to another fiber, and the fact that aramid fiber largely deviated in price from substitute products. *Id.* at I–14 n.84. In any case, the Commission observed that adverse price effects caused by substitute products were in addition to those caused by LTFV imports from Akzo. *Id.* The court finds no error in the Commission's conclusion. The evidence taken as a whole supports the Commission's determination that Akzo's LTFV imports were causing adverse price effects upon the domestic industry.

C. Impact of LTFV imports on the domestic industry:

The Commission determined that, on an industry-wide and market-segmented level,[14] there was significant evidence of lost sales. *Final Det.* at I–14. As a result, the Commission concluded that declining sales and market shares, reduced employment levels, and the impaired financial condition of the domestic industry were caused by LTFV imports from the Netherlands. *Id.* at I–15. Additionally, the Commission found that the subject imports had actual and potential negative effects on the domestic industry's existing development and production efforts. *Id.* Based upon these findings, the Commission concluded that LTFV imports were having a negative impact on the domestic industry.

The Commission dismissed Akzo's contention that inter-fiber competition was the primary cause of injury to the domestic industry. Akzo failed to document any instances where "it sold aramid fiber to customers who had previously switched [from Du Pont fibers] to other fibers." *Id.* at I–15. The record also indicates that, while domestic shipments declined, LTFV imports increased significantly in several end-use markets where overall shipments increased, thereby displacing domestic products. *Conf. Final Det.* at I–26. The displacement conclusion is further supported by purchaser questionnaire responses stating that several purchasers specifically switched to the LTFV imports because of lower prices, as compared to the domestic product. *Final Det.* at I–15; *see Conf. Staff Rpt.* at I–93, I–95–I–98, I–101, I–104–I–105.

The court notes that this is the rare case where anecdotal lost sales data was probative, and because of Du Pont's position as the single U.S. producer and Akzo's position as the only foreign producer, together with Akzo's pricing policies, the nexus between imports and injury is particularly clear. Accordingly, the court sustains the Commission's determination that the domestic PPD-T aramid fiber industry was materially injured by reason of the LTFV imports from the Netherlands.

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[14] Akzo alleges that, based on the limited interchangeability among the PPD-T aramid product forms, the Commission should have conducted its entire material injury analysis on the basis of market segments, rather than relying upon certain market segment data that supported its injury determination. *See Conf. Final Det.* at I–26-I–27. The court disagrees. The selection of pricing data for analysis appears to have been made upon a reasonable basis. Furthermore, the Commission is not required as a general matter to conduct a market-segmented material injury analysis. *See Encon Indus., Inc. v. United States*, 16 CIT 840, 842 (1992); *see also Copperweld Corp. v. United States*, 12 CIT 148, 162, 682 F. Supp. 552, 566 (1988) ("[N]either the governing statute nor its legislative history require the ITC to adopt any particular analysis when the market consists of several segments."). Rather, the facts of a particular case will determine a range of acceptable methodologies. The methodologies employed here are within that range.

CONCLUSION

In conclusion, the court finds the Commission's single like product determination to be supported by substantial evidence. Further, Akzo has failed to demonstrate error as to the Commission's material injury determination. Thus, the Commission's affirmative material injury determination for the Netherlands is found to be supported by substantial evidence, is in accordance with law, and is sustained.

(Slip Op. 95–114)

SUNDSTRAND CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–03–00149

Plaintiff, Sundstrand Corporation, brings this motion, pursuant to Rule 56.2 of this Court, for judgment upon the agency record contesting the final scope ruling issued by the U.S. Department of Commerce, International Trade Administration ("Commerce"), concluding that Sundstrand's outer race of a cylindrical roller bearing is within the scope of the countervailing duty order on antifriction bearings (other than tapered roller bearings) and parts thereof from Singapore. *Final Affirmative Countervailing Duty Determinations and Countervailing Duty Orders: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Singapore*, 54 Fed. Reg. 19,125 (May 3, 1989).

Held: Plaintiff's motion is denied, Commerce's scope ruling is sustained and this case is dismissed.

[Commerce's scope determination is affirmed; this case is dismissed.]

(Dated June 21, 1995)

Barnes, Richardson & Colburn (*Robert E. Burke* and *Lawrence M. Friedman*) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael S. Kane*); of counsel: *Stacy J. Ettinger*, Attorney-Advisor, United States Department of Commerce, for defendant.

OPINION

TSOUCALAS, *Judge:* Plaintiff, Sundstrand Corporation, its operating unit Sundstrand Aerospace and its wholly-owned subsidiary Sundstrand Pacific, Pte., Ltd. (collectively "Sundstrand"), brings this motion, pursuant to Rule 56.2 of this Court, for judgment upon the agency record contesting the final scope ruling issued by the U.S. Department of Commerce, International Trade Administration ("Commerce"), concluding that Sundstrand's part number 742973, the outer race of a cylindrical roller bearing, is within the scope of the countervailing duty order on antifriction bearings (other than tapered roller bearings) and parts thereof from Singapore. *Final Affirmative Countervailing Duty Determinations and Countervailing Duty Orders: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Singapore* ("*Final Determination*"), 54 Fed. Reg. 19,125 (May 3, 1989).

BACKGROUND

On March 31, 1988, The Torrington Company ("Torrington"), a United States manufacturer of antifriction bearings ("AFBs"), filed an antidumping and countervailing duty petition on all antifriction bearings (other than tapered roller bearings) and all parts thereof, both finished and unfinished from several countries, including Singapore. *Petition Requesting the Imposition of Antidumping and Countervailing Duties on Imported Antifriction Bearings* ("*Petition*") at 1–20. Sundstrand took no role in the resulting administrative investigation or subsequent annual reviews. *Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record and Brief in Support Thereof* ("*Plaintiff's Brief*") at 5.

In response to the petition, Commerce initiated a countervailing duty investigation on antifriction bearings (other than tapered roller bearings) and parts thereof from Singapore. *Initiation of Countervailing Duty Investigation; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Singapore,* 53 Fed. Reg. 15,084 (April 27, 1988). On September 6, 1988, Commerce published its preliminary affirmative countervailing duty determination, *Preliminary Affirmative Countervailing Duty Determinations: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Singapore* ("*Preliminary Determination*"), 53 Fed. Reg. 34,329 (September 6, 1988), which specifically identified an outer race of a cylindrical bearing—as a bearing part covered by the investigation:

> These investigations cover all of the subject bearings and parts thereof outlined above with certain limitations. With regard to *finished* parts (inner race, outer race, cage, rollers, balls, seals, shields, etc.), all such parts *are included* in the scope of these investigations. For *unfinished* parts (inner race, outer race, rollers, balls, etc.), such parts are included *if* (1) they have been heat treated, or (2) heat treatment is not required to be performed on the part. Thus, the only unfinished parts that are *not* covered by these investigations are those where the part will be subject to heat treatment after importation.

Preliminary Determination, 53 Fed. Reg. at 34,333.

On May 3, 1989, Commerce published its Final Determination and Order. *Final Determination,* 54 Fed. Reg. 19,125. The Final Determination incorporated the language set forth above from the Preliminary Determination specifically identifying an "outer race" as a bearing part within the scope of the investigation. *Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany* ("*Scope Appendix*"), 54 Fed. Reg. 18,992, 18,997–98 (May 3, 1989).

During the investigation, several respondents argued that aerospace bearings "have physical characteristics that are different from those of the bearings subject to these investigations," "satisfy unique customer expectations and needs," and, are "specialized products manufactured in accordance with specialized and detailed aerospace standards." *Scope*

Appendix, 54 Fed. Reg. at 19,010-12. Commerce, however, refused to exclude such bearings from the scope of its order on the basis of quality, design, precision, end-use, material content or degree of engineering control. *Id.* at 19,012. Similarly, the Final Determination emphasized that "tariff classification numbers are *not* determinative of the products under investigation." *Id.* at 19,011.

Specifically, Commerce stated that:

> * * * to accept the argument that aircraft engine bearings are a separate class or kind would require the Department to reach an unreasonable conclusion—*i.e.,* that for each specific application in which a particular bearing may be used, a separate class or kind of merchandise would be determined to exist.
>
> That material content, quality, design, precision, or degree of engineering control may differ is typical of the subject merchandise since bearings are used in an enormous variety of specialized final applications. However, these products all provide and have in common the functional capabilities of the bearings under investigation.

Scope Appendix, 54 Fed. Reg. at 19,012.

Accordingly, Commerce determined that its countervailing duty order regarding antifriction bearings would include all AFBs used in aviation applications so long as they were related to the reduction of friction. *Id.* at 19,010.

On October 30, 1992, Sundstrand filed a request for clarification of the scope of the countervailing duty order in this investigation. *Plaintiff's Brief* at 6. On February 4, 1993, Commerce determined that the product in question as imported was within the scope of the order on cylindrical roller bearings and parts thereof. *Final Scope Ruling—Countervailing Duty Order on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Singapore: Request by Sundstrand Aerospace* ("*Final Scope Ruling*") at 1–4. Commerce rejected Sundstrand's arguments regarding the end-use and final application of the bearing as irrelevant. *Final Scope Ruling* at 3. On March 5, 1993, Sundstrand filed its summons challenging Commerce's Final Scope Ruling and the present action ensued.

DISCUSSION

This Court must uphold Commerce's determination as to whether a particular type of merchandise is within the scope of a countervailing duty order unless Commerce's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is defined as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of

the record." *Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed Cir. 1990).

In this action, Sundstrand requests a review of Commerce's response to its request for a scope clarification of the countervailing duty order. Sundstrand raises three arguments alleging Commerce's findings were not in accordance with law and were not supported by substantial evidence. *Plaintiff's Brief* at 7–8.

1. *Scope of Order:*

Sundstrand argues that part number 742973 performs substantial and independent non-antifriction bearing functions, is substantially advanced in function and value and is therefore outside the scope of the merchandise covered by the countervailing duty order. Sundstrand bases its argument upon several Commerce determinations which found an item to be outside the class or kind of merchandise covered by an order because of substantial advancements in function or value. Sundstrand cites as an example *Final Determination of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 18,992, 19,017 (May 3, 1989) wherein Commerce stated that when the value of a bearing incorporated into the imported product constitutes a relatively small portion of the overall value of the components, it "appears obvious that the product is substantially more than a bearing." Sundstrand contends the principle of administrative law that an agency must be consistent with its prior actions or explain its deviation therefrom compels Commerce to apply the same standards as it did in the cited scope clarification of textile machine components. *Plaintiff's Brief* at 10–16.

Plaintiff asserts part number 742973 is advanced in both function and value beyond a simple bearing. Sundstrand states the part is principally a housing which holds a hydraulic unit together and provides support and positioning for a hydraulic assembly. Its function of incorporating the outer race of a cylindrical roller bearing is ancillary to these other functions, according to plaintiff. *Plaintiff's Brief* at 14–15.

Commerce states it has correctly determined that Sundstrand's part number 742973 is covered by the order because the outer race of a cylindrical bearing is a bearing part and falls squarely within the definition of the covered merchandise. Defendant states its published determinations make it clear Commerce did not intend to distinguish between AFBs based upon criteria such as design features, end-applications, quality, precision or enhanced capabilities. Defendant asserts it properly relied upon the dispositive descriptions of merchandise contained in the petition, initial investigation and determinations of Commerce. Commerce characterizes Sundstrand's position as an unreasonable construction of the order and as inadequately supported by the argument that its bearing parts are for use in aerospace engines and are unique and highly designed. *Defendant's Memorandum in Opposition to*

Plaintiff's Motion for Judgment Upon the Agency Record ("*Defendant's Brief*") at 14–23.

This Court has repeatedly held that Commerce has inherent authority to define the scope of an antidumping duty investigation. *NTN Bearing Corp. of America v. United States,* 14 CIT 623, 627, 747 F. Supp. 726, 731 (1990) (and cases cited therein). To determine whether a particular class or kind of foreign merchandise falls within the scope of an investigation, Commerce examines the description of the merchandise contained in the petition. *See Mitsubishi Elec. Corp. v. United States,* 12 CIT 1025, 1027, 700 F. Supp. 538, 541 (1988), *aff'd,* 898 F.2d 1577 (Fed. Cir. 1990). "The determination as to whether a product is covered by an antidumping investigation is one which the ITA must make with ample deference to the intent of the petition." *Torrington Co. v. United States,* 16 CIT 99, 105, 786 F. Supp. 1021, 1026 (1992) (citation omitted), *dismissed,* 16 CIT 861, 802 F. Supp. 453 (1992). Although Commerce has the authority to clarify the scope of an antidumping duty determination, Commerce may not alter the scope of a pre-existing order "in a way contrary to its terms." *Smith Corona Corp. v. United States,* 915 F.2d 683, 686 (Fed. Cir. 1990).

The petition in this case expressly provides that:

> The merchandise covered by this petition consists of all antifriction bearings and *all parts thereof* both finished and unfinished, with the exception of tapered roller bearings. Included within the scope of this petition are ball bearings, cylindrical roller bearings, spherical roller bearings, spherical plain bearings, needle roller bearings, thrust bearings, tappet bearings, and all mounted bearings such as set screw housed units, bushings, pillow block units, flange, cartridge and take-up units and parts including balls, rollers, cages or retainers, cups, shields and seals.

Public Document No. 9 at 59 (emphasis added). The petition goes on to specifically include in its coverage:

> the complete bearing assembly (inner and outer rings or races, balls or rollers and separator in sets), *outer rings or races alone,* inner rings alone or assembled together with balls or rollers and separator, balls or rollers alone and all parts of bearings whether finished or unfinished, single-row and multiple-row bearings of various angles and lengths, thrust bearings, tappet bearings, bushings and all mounted bearings.

Public Document No. 9 at 79–80 (emphasis added).

In addition, Sundstrand itself concedes that part number 742973 is and functions as, at least in part, an outer race of a cylindrical roller bearing. *Plaintiff's Brief* at 2–4.

Further, Commerce did not intend to distinguish between AFBs based upon such criteria as quality, precision, design features, end-application or enhanced capabilities. In fact, Commerce refused to create exclusions based upon such criteria, recognizing that any such exclusion would be unreasonable due to the "enormous variety of specialized final applications." *Scope Appendix,* 54 Fed. Reg. at 19,011–12.

Commerce found that Sundstrand's arguments fail to distinguish between part number 742973 and the end product into which it is incorporated. These arguments address only the end product, an aircraft component. Commerce has distinguished between AFBs covered by the order and AFBs that are incorporated into textile machinery components prior to importation and then imported as a component of such merchandise. Those AFBs which are ultimately utilized in textile machinery are clearly covered by the investigations. *Scope Appendix,* 54 Fed. Reg. at 19,017. In contrast, part 742973 is imported as an AFB part, the outer race of a cylindrical bearing that serves the function of reducing friction.

This Court finds that such a distinction is reasonable. Upon consideration of the record, the contentions of the parties and the deference this Court must grant Commerce's scope determination, the Court finds that Commerce's scope determination as to Sundstrand part number 742973 was in accordance with law and supported by substantial evidence. This Court therefore affirms Commerce on this issue.

2. *Application of the Roller Chain Principle:*

Alternatively, Sundstrand maintains that even if the part involved herein falls within the scope of the order, it should be excluded from the scope of the countervailing order by virtue of the "Roller Chain" principle. *See Roller Chain, Other Than Bicycle, From Japan; Final Results of Administrative Review of Antidumping Finding,* 48 Fed. Reg. 51,801, 51,804 (Nov. 14, 1983). Plaintiff asserts that, as merchandise imported by a manufacturer from a related party and then incorporated into a finished product that is not covered by the order, the merchandise at issue should be excluded from the scope of the order because it makes up less than one percent of the finished product. Accordingly, plaintiff argues that, as countervailing duties are only to be assessed on the "class or kind" of merchandise receiving the subsidy, the "Roller Chain" rule operates to exclude the merchandise at issue from the "class or kind." For support, Sundstrand cites the final results of administrative reviews where Commerce states it would not assess antidumping duties against imports of merchandise which qualify under the "Roller Chain" principle.[1] *Plaintiff's Brief* at 17–22.

Defendant maintains that a scope ruling involves a determination as to whether a product is within the "class or kind of merchandise" covered by an order. If an item is not of the same "class or kind of merchandise" as the merchandise covered by an order, the item cannot be subject to duties pursuant to that order. 19 U.S.C. § 1677j (1988). The "Roller Chain" principle, by contrast, does not operate to permanently remove merchandise from the scope of an order. Defendant argues Commerce properly held that a "Roller Chain" determination would be inappropriate in the context of a scope determination because the "Roller Chain"

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[1] *E.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews,* 57 Fed. Reg. 28,360, 28,377 (June 24, 1992).

rule operates with respect to specific transactions during a specific review period. Additionally, Commerce suggests that the "Roller Chain" principle applies only in antidumping duty situations and not, as here, in a countervailing duty proceeding. *Defendant's Brief* at 23–29.

This Court finds that the "Roller Chain" principle does not apply in this case. The product in question as imported was within the scope of the order on AFBs and parts thereof. *See* discussion *supra.* Although pursuant to the "Roller Chain" principle merchandise covered by an order is not subject to duties if it represents an insignificant amount of the value of the finished product sold to the first unrelated purchaser in the United States, Commerce cannot know at the time of entry whether the "Roller Chain" principle will operate to exclude any particular entry from the scope of the order. Thus, Commerce cannot apply the "Roller Chain" principle in such a way as to limit the collection of duties.

Commerce aptly cites *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews,* 57 Fed. Reg. at 28,378:

> * * * [Commerce has] no way of knowing at the time of entry whether the "Roller Chain" principle will operate to exclude any particular entry from the scope of the order. We cannot, therefore, accept any proposal which would limit the collection of antidumping duty deposits on merchandise which may ultimately be subject to the order.

This Court agrees with defendant's contention that a "Roller Chain" analysis is inappropriate in the context of a scope proceeding because that principle operates only with respect to specific transactions during a specific review period. Under these circumstances, Commerce's determination that a "Roller Chain" analysis is more properly addressed within the context of an administrative review is reasonable and in accordance with law. Accordingly, Commerce is affirmed as to this issue.

3. *Failure to Hold a Hearing:*

Sundstrand maintains Commerce's failure to hold a hearing at which Sundstrand could have presented a sample of the merchandise and displayed how it performs functions unrelated to the reduction of friction has resulted in a determination which is unsupported by substantial evidence and not in accordance with law. As it had requested a hearing prior to the final determination, Sundstrand contends that 19 U.S.C. § 1677c(a)(1) (1988) requires Commerce to hold a hearing in a scope proceeding. Accordingly, plaintiff requests a remand ordering Commerce to hold a full hearing on this scope determination. *Plaintiff's Brief* at 22.

Commerce refutes plaintiff's position, pointing out that Commerce has established notice and comment procedures to afford parties an opportunity to participate meaningfully in a scope proceeding. *See* 19 C.F.R. § 355.29(d); *Defendant's Brief* at 29–30.

19 U.S.C. § 1677c(a)(1) reads as follows:

> **(1) In general**
> Except as provided in paragraph (2), the administering authority and the Commission shall each hold a hearing in the course of an investigation upon the request of any party to the investigation before making a final determination under section 1671d or 1673d of this title.

This provision requires a hearing before a final determination in an investigation either pursuant to 19 U.S.C. § 1671d (*i.e.,* countervailing duty final determinations) or pursuant to 19 U.S.C. § 1673d (*i.e.,* antidumping duty final determinations). Paragraph (2) sets out an exception to paragraph (1) regarding special circumstances which are not relevant here. Therefore, this Court finds that 19 U.S.C. § 1677c(a)(1) does not require Commerce to hold a hearing in a scope proceeding.

In light of the above, this Court finds that Sundstrand's contention that a hearing is required to be held by Commerce in a scope proceeding has no merit whatsoever. Commerce's notice and comment procedures provided Sundstrand with ample opportunity to submit whatever information it possessed in support of its request for a scope ruling. Accordingly, this Court affirms Commerce as to this issue.

CONCLUSION

For the foregoing reasons plaintiff's motion is denied and Commerce's scope determination is affirmed in all respects. This action is dismissed.

(Slip Op. 95–115)

UNITED STATES, PLAINTIFF *v.* HITACHI AMERICA, LTD., AND HITACHI, LTD., DEFENDANT

Court No. 93–06–00373

(Dated June 21, 1995)

ORDER

At a hearing in the Court on April 14, 1995, held, in part, to consider certain discovery demands of Defendants, which demands were refused by Plaintiff on various grounds, *i.e.,* confidentiality, "work product," *etc.,* the Court offered to review the disputed documents *in camera* for the purpose of ascertaining whether the asserted defenses against production were valid and appropriate. Plaintiff submitted to the Court, on around May 1, 1995, five loose leaf binders, weighing approximately 42 pounds and containing an estimated 3500 pages, and in addition one audio tape.

Two of the five volumes were titled Confidential Redacted [*sic*] documents. Many of these documents were radically "redacted," that is to say, consisted of blank pages. For example, one such document, titled "Case Chronology & Review Form" consists of seventeen pages, all completely blank. The Court being unable to discern any confidentiality from these wholly specious "*in camera*" offerings, finds that the documents are not entitled to confidentiality and must be disclosed to Defendant **in wholly unredacted form.** The same is true for all of the so-called redacted documents. The *only* permissible redactions will be home addresses and telephone numbers of individuals.

With respect to the three volumes of unredacted "confidential" papers, the only documents found to be privileged are the few letters of counsel to client. The alleged confidentiality of "work product" of the U.S. Customs Service and Treasury Department employees is denied.

The Court notes with disapprobation the attempt by Plaintiff to swamp the Court with volumes of paper and unfounded and capricious assertions of privilege and frivolous allegations of lack of relevance. For example, a letter from Plaintiff's counsel to Defendant's counsel-obviously already in the possession of Defendant-is among the documents withheld as "privileged." The Court will not continue to countenance these obfuscatory tactics, nor the attempt to litigate and hold hearings on every scrap of documentation. This matter has been marked by intransigence and confrontational tactics from the beginning: it *shall* cease, and the parties shall move forward with appropriate and efficient preparation for trial. Failure to do so may well result in appropriate sanctions. It is hereby

ORDERED that all "redacted" documents submitted to the Court shall be turned over to Defendants, and the Court, in unredacted form, except for home addresses and telephone numbers of individuals; all other allegedly confidential documents with the exception of letters to and from counsel shall be disclosed to Defendant in unredacted form. Such disclosures shall be completed within thirty calendar days of the date of the Order, and the Court shall be notified in writing of compliance therewith.

Upon consideration of Plaintiff's Motion for Reconsideration of Motion to Compel and Plaintiff$s Motion for Oral Argument thereon; and upon consideration of Defendant's Motion to Strike, it is hereby

ORDERED that Plaintiff's Motion for Reconsideration is denied. Oral argument on Defendant's Motion to Strike is rescheduled for July 6, 1995, at 10:00 a.m., Courtroom 2, at the United States Court of International Trade.

(Slip Op. 95–116)

SUGIYAMA CHAIN CO., LTD., I&OC OF JAPAN CO., LTD., AND HKK CHAIN CORP. OF AMERICA, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 92–12–00798

Plaintiffs challenge Commerce's second remand determination addressing plaintiffs' claimed level of trade adjustment which arose from Commerce's administrative review of the antidumping finding on roller chain, other than bicycle, from Japan, *Roller Chain, Other Than Bicycle, From Japan,* 57 Fed. Reg. 56,319 (Dep't Comm. 1992) (final results), as amended by *Roller Chain, Other Than Bicycle, From Japan,* 57 Fed. Reg. 58,285 (Dep't Comm. 1992) (final results).

Held: Commerce's second remand determination is sustained. This action is dismissed.

(Dated June 23, 1995)

Arent Fox Kintner Plotkin & Kahn (Patrick F. O'Leary and Peter L. Sultan) for plaintiffs.

Frank W. Hunger, Assistant Attorney General of the United States, *David M. Cohen,* Director, Civil Division, Commercial Litigation Branch, United States Department of Justice *(Michael S. Kane); Patrick V. Gallagher, Jr.,* Attorney-Advisor, Office of Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for defendant.

OPINION

CARMAN, *Judge:* Plaintiffs Sugiyama Chain Co., Ltd., I&OC of Japan Co., Ltd. (I&OC), and HKK Chain Corp. of America (collectively "plaintiffs" or "Sugiyama") challenge the results of the Department of Commerce's (Commerce or Department) second remand determination (*Second Remand Results*) rejecting plaintiffs' claimed level of trade adjustment. This dispute arises from Commerce's April 1, 1990, through March 31, 1991, administrative review of the antidumping finding on roller chain, other than bicycle, from Japan. *See Roller Chain, Other Than Bicycle, From Japan,* 57 Fed. Reg. 56,319 (Dep't Comm. 1992) (final results), as amended by *Roller Chain, Other Than Bicycle, From Japan,* 57 Fed. Reg. 58,285 (Dep't Comm. 1992) (final results). The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (1988).

BACKGROUND

A. *Case History:*

By an opinion and order of this Court, the final results of Commerce's April 1, 1990, through March 31, 1991, administrative review of the antidumping finding on roller chain, other than bicycle, from Japan, was remanded for a second time on the issue of plaintiffs' claimed level of trade adjustment. *Sugiyama Chain Co., Ltd. v. United States,* 19 CIT ____, 880 F. Supp. 869 (1995) (*Sugiyama III*); *see also Sugiyama Chain Co., Ltd. v. United States,* 18 CIT ____, 865 F. Supp. 843 (1994) (*Sugiyama II*) (remanding this administrative review for the first time on three issues, including plaintiffs' claimed level of trade adjustment).

Pursuant to this Court's instructions in *Sugiyama II,* Commerce was supposed to have addressed whether a comparison of United States sales by Sugiyama directly to I&OC, an unrelated trading company, with home market sales by Sugiyama through related distributors "Companies E and H"[1] to their respective unrelated customers merited a level of trade adjustment. *See Sugiyama III,* 19 CIT at ____, 880 F. Supp. at 874. Plaintiffs argued that home market customers buying through Sugiyama's related distributors Companies E and H

> were at a second level of trade because their purchases were made through the home market intermediary distributors* * *. [E]ssentially it is plaintiffs' position that an adjustment to [foreign market value] is necessary to account for marketing, sales, distribution and collection expenses incurred by Companies E and H to their customers and ostensibly reflected in their resale prices at the second level of trade, which prices Commerce compared with Sugiyama's U.S. sales directly to I & OC at the first level of trade. The short of the matter is that plaintiffs claim that a level-of-trade adjustment is in order to avoid a dumping margin calculation based on unfair price comparisons.

Id. at ____, 880 F. Supp. at 875. Plaintiffs also complained that Commerce had failed to address plaintiffs' proposed alternative methodology for quantifying the claimed level of trade adjustment. *Id.* at ____, 880 F. Supp. at 875.

Upon review of the determination, this Court found Commerce had failed once again to adequately address Sugiyama's claimed level of trade adjustment. *See id.* at ____, 880 F. Supp. at 875. Although counsel for defendant attempted to argue to this Court that Sugiyama did not provide a "basis for determining whether all, part, or none of the related distributors' alleged selling expenses differ from expenses incurred by Sugiyama—or how the individual components of the expenses relate to price differences incurred as a result of making sales at several levels of trade,"[2] defendant's first remand determination "utterly fail[ed] to raise, much less address, such issues." *Id.* at ____, 880 F. Supp. at 874. This Court also found Commerce had again failed to address plaintiffs' proposed alternative methodology for quantifying the claimed level of trade adjustment. *Id.* at ____, 880 F. Supp. at 875. Accordingly, this Court remanded to Commerce "for a full explanation of its rationale on Sugiyama's claim for a level-of-trade adjustment, thus eliminating the need for speculation by the court and plaintiffs as to the specific issues

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[1] The companies are referred to as "Companies E and H" for confidentiality purposes.

In *Sugiyama II,* plaintiffs contended Commerce erroneously determined Sugiyama and Company E are related parties. *See Sugiyama II,* 18 CIT at ____, 865 F. Supp. at 845. This Court held Commerce's determination that Sugiyama and Company E are related parties within the meaning of 19 U.S.C. § 1677(13)(C) was based on substantial evidence on the record. *See id.* at ____, 865 F. Supp. at 849. The relation of Sugiyama and Company H is not contested.

Accordingly, this Court notes an error in *Sugiyama III* where this Court stated that in *Sugiyama II,* the Court had remanded "the level-of-trade adjustment issue to address whether a comparison of U.S. sales by Sugiyama directly to I&OC, an unrelated trading company, with home market sales by Sugiyama through *unrelated* intermediary distributing [C]ompanies E and H to their respective customers merits a level of trade adjustment." *Sugiyama III,* 19 CIT at ____, 880 F. Supp. at 874 (describing *Sugiyama II*) (emphasis added). The Court should have referred to Companies E and H as *related* companies.

[2] *Sugiyama* III, 19 CIT at ____, 880 F. Supp. at 874 (citation and internal quotation marks omitted).

and information that the agency considered in making its determination." *Id.* at ____, 880 F. Supp. at 875.

B. *Commerce's Second Remand Results:*

In Commerce's *Second Remand Results* presently before this Court, Commerce explains its rejection of Sugiyama's claimed level of trade adjustment as follows. Under Commerce's regulations, any party seeking an adjustment to foreign market value bears the burden of establishing a basis for its claim. *See Second Remand Results* at 3 (citing 19 C.F.R. § 353.54). For level of trade adjustments, Commerce reports its practice is to require a respondent to: (1) request the adjustment; (2) "demonstrate that distinct, discernable levels of trade exist by describing the functions performed at each level"; and (3) quantify the adjustment, "normally by demonstrating that it incurred differing selling expenses on sales to different levels of trade." *See id.* at 3–4 (citing 19 C.F.R. § 353.54 and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany,* 56 Fed. Reg. 31,692, 31,710 (Dep't Comm. 1991) (final results)). In Sugiyama's case, Commerce acknowledges Sugiyama requested a level of trade adjustment in its response to Commerce's original questionnaire. *See id.* at 4. Commerce concludes, however, that Sugiyama has failed on the second and third requirements of showing justification for and quantification of the claimed level of trade adjustment. *See id.* at 8, 9, 13.

1. Distinct, Discernable Levels of Trade:

On the issue of showing justification for Sugiyama's claimed level of trade adjustment, Commerce states in the *Second Remand Results* first that Sugiyama supported its claim for a level of trade adjustment by asserting that "sales to I&OC were made at 'wholesale level one,' whereas the home market sales to which those sales were matched, sales from Sugiyama's related distributors, [C]ompanies E and H, to their respective customers, were made at 'wholesale level two.'" *Id.* at 4. Commerce complains, however, that Sugiyama failed to define "distributor" and its "wholesale level" terms. *Id.* Thus, Commerce reasons, "record support for Sugiyama's claim that the customers of [C]ompanies E and H are at a different [level of trade] than I&OC is based *solely* on the fact that I&OC purchases merchandise directly from Sugiyama, whereas the customers of [C]ompanies E and H buy from another company (E or H) which buys directly from Sugiyama." *Id.* at 4–5.

Second, Commerce explains it looks to the function of the purchaser to determine whether sales are made at different levels of trade. *Id.* at 5. According to Commerce, its long-standing practice is to

> rely on the respondent's description of the functions performed by the purchaser in the market or distribution network to determine individual [levels of trade] and the extent to which discernable [levels of trade] exist. In addition, a particular purchaser's [level of trade] is not determined by the number of transactions which occur prior to its purchase of the merchandise.

Id. Commerce states that here, however, Sugiyama neither described the functions performed by the purchasers at issue nor defined the terms used to describe those purchasers. *Id.* Furthermore, Commerce explains, questions raised because Sugiyama labeled all of the purchasers at issue "distributors" "should have been answered through a thorough explanation of the functions performed by each of the customers at issue." *Id.* Commerce states, however, that Sugiyama did not proffer an explanation despite Commerce's request that Sugiyama explain why a level of trade adjustment was warranted. *Id.* at 5–6 (citation omitted).

Third, Commerce states in the *Second Remand Results* that notwithstanding Sugiyama's assertion to Commerce that Sugiyama did describe the various levels of trade involved in its questionnaire responses, the portions of the responses to which Sugiyama refers "contain nothing more than unsupported claims that I&OC is at a different [level of trade] than the customers of E and H, and not descriptions (*e.g.* characterizations, explanations, portraits) of these levels or the functions performed at these levels." *Id.* at 6. Commerce also disputes Sugiyama's argument it cannot be faulted for not providing information because Commerce failed to request an explanation of the functions of the purchasers at issue. *Id.* Commerce explains its

> request for an explanation of why a [level of trade] adjustment is necessary generated no explanation of the nature of the various levels or the buyers at issue. Had Sugiyama submitted any examination of the various levels of trade and an explanation of how they differ, we would have included it in our analysis.

Id. Commerce adds that in the appendix to a September 27, 1991, questionnaire, Commerce explicitly stated that the respondent is required to justify each adjustment and its allocation to individual items. *Id.* at 7 (citation omitted).

Finally, to further illustrate its conclusion that Sugiyama failed to justify the claimed level of trade adjustment, Commerce disputes the characterization of *Potassium Permanganate From Spain,* 56 Fed. Reg. 58,361 (Dep't Comm. 1991) (final results) (*Potassium Permanganate*), which Sugiyama argued to Commerce. *Id.* Commerce states that although

> Sugiyama correctly observes that the central issue in *Potassium Permanganate* was whether a [level of trade] adjustment was appropriate to account for an additional [level of trade] between the first unrelated buyer and the enduser in the U.S. market, this observation does not negate the general rule * * * that we look to the type and function of a purchaser to determine its trade level.

Id. at 8.[3] On the issue of demonstrating distinct, discernable levels of trade, Commerce concludes that "[a]bsent an explanation from Sugiyama regarding the functions performed by the various distributors at issue, the Department must conclude that for home market sales the distribution functions are simply divided between Sugiyama and E and H, whereas for U.S. sales these same functions are consolidated within Sugiyama." *Id.*

2. Quantification of the Claimed Level of Trade Adjustment

On the issue of Sugiyama's quantification of the claimed level of trade adjustment, Commerce concludes Sugiyama has failed to provide the data necessary to make an adjustment to sales made by Companies E and H. *Id.* at 9. To quantify a claimed level of trade adjustment, Commerce explains, "a respondent normally must demonstrate that it incurred differing indirect selling expenses on sales to different levels of trade in the home market, and that these differences in selling expenses are attributable to differences in levels of trade." *Id.* at 8–9 (citation omitted).[4] Commerce explains that Sugiyama's response, however, was deficient because: (1) the only information Sugiyama submitted was a list of its "indirect selling expenses"; (2) Sugiyama did not indicate the customers or the markets to which these expenses are attributable; (3) only the ratios of selling expenses to total sales of Companies E and H were provided, these ratios were not provided with supporting information or documentation, and without this supporting information, Commerce cannot "determine whether these figures represent total sales and expenses or total domestic sales and expenses, and whether the total sales figure includes products other than roller chain"; and (4) Sugiyama "should have provided evidence as to how the related parties' selling expenses were derived, the specific cost components that comprise the aggregate expense figures used to calculate the ratios, and a demonstration that indirect selling expenses were incurred as a result of the related parties' [level of trade], as opposed to expenses that Sugiyama itself incurs when it sells to an unrelated distributor." *Id.* at 9–10.

Commerce further explains that in a supplemental questionnaire, it asked Sugiyama to provide documentation in support of Sugiyama's claim and methodology. *Id.* at 10. In response, however, Commerce states "Sugiyama submitted only the total sales and total selling expenses for [C]ompany H," but did not submit "information concerning what merchandise falls within the total sales figure for [C]ompany H, and there is no information concerning whether the total sales and

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[3] In the *Second Remand Results*, Commerce also notes the following statement from *Potassium Permanganate*:

> In the U.S. market, the first sale to an unrelated buyer is to a distributor. In the home market, the first sale to an unrelated buyer is to a distributor. Respondent agrees that the first unrelated buyer in each market is a distributor* * *.
>
> Because we have compared only sales to distributors in both markets, no consideration of a level of trade adjustment is warranted under the facts of this case.

Second Remand Results at 8 (quoting *Potassium Permanganate*, 56 Fed. Reg. at 58,364). Commerce states that in the present case, Sugiyama's own submissions refer to both the "intervening parties" and buyers as "distributors." *Id.*

[4] According to Commerce, Sugiyama could have submitted the following: (1) Sugiyama's total sales and indirect selling expenses on sales to each of the various types of customer; (2) Company E's total sales and indirect selling expenses on sales to its customers; and (3) Company H's total sales and indirect selling expenses on sales to its customers. *Second Remand Results* at 9.

general expenses figures for [C]ompany H represent all sales by that company or only a portion of those sales." *Id.* at 10–11. Commerce explains that "[s]uch elementary information is necessary for the Department to even begin an analysis of Sugiyama's suggested quantification methodology, let alone determine its adequacy." *Id.* at 11. Commerce concludes that "[f]or the purposes of providing a precise quantification of a claimed [level of trade] adjustment, these four numbers (the two ratios, and the total sales and total selling expenses for [C]ompany H) are insufficient to permit us to fully comprehend or accept the basis of the Sugiyama claim." *Id.* at 10. Furthermore, Commerce states, Sugiyama "would still need to demonstrate that selling expense differences were due, at least in part, to selling at different levels of trade." *Id.* at 10–11.

Commerce also disputes Sugiyama's contention, submitted on Commerce's draft remand, that quantification of Sugiyama's claimed level of trade adjustment is not required because costs associated with an additional level in a distribution system in the home market, by definition, are due to selling at different levels of trade. *Id.* at 11 (citation omitted). Commerce states that this statement "is based on the assumptions that (a) different levels of trade exist and (b) all of the cost differences between the levels of trade are attributable to selling at different levels of trade." *Id.*

Additionally, Commerce rejects Sugiyama's suggested alternative quantification methodology submitted in response to Commerce's supplemental questionnaire. *See id.* at 11–13. According to Commerce, "Sugiyama suggested that the Department subtract the Sugiyama-to–[C]ompany E (or H) prices from the [C]ompany E (or H) prices to its customers and to use the entire difference as the [level of trade] adjustment." *Id.* at 11–12. Commerce explains Sugiyama claimed its alternative methodology would be analogous to adjustments Commerce makes for payment of commissions to a related commissionaire. *Id.* at 12. Commerce states, however, that Sugiyama's claim is faulty because: (1) a commissionaire's functions and responsibilities are presumably different from those of a distributor; and (2) if E and H were related commissionaires, Commerce "would still require a demonstration that the commissions paid were at arm's length and tied directly to sales." *Id.*

Furthermore, Commerce states, contrary to Sugiyama's conclusion, Commerce has not refused to make a level of trade adjustment using Sugiyama's proposed alternative methodology only because E and H are related to Sugiyama. *Id.* Instead, Commerce maintains, Sugiyama's proposed methodology is deficient because: (1) "there is no demonstration that the differences in prices are due to selling at different levels of trade"; and (2) "the relationship of [C]ompanies E and H to Sugiyama makes suspect the use of prices from Sugiyama to E and H in calculating a [level of trade] adjustment to sales made by E and H." *Id.* at 12–13. Commerce concludes that "[a]bsent a detailed demonstration to the contrary, the Department must assume that at least some of the alleged

price differences are due to factors other than selling at different levels of trade, including the relationship itself." *Id.* at 13.

Finally, Commerce adds, Sugiyama's comparison of sales from Sugiyama to I&OC with home market sales to distributors is an inter-market price comparison approach Commerce has consistently rejected. *Id.* "It is impossible," Commerce explains, "to determine if price differences result from selling at different levels of trade or from other factors affecting prices, such as market restrictions or competition, or if the prices differences are simply a manifestation of dumping." *Id.* Commerce concludes in the *Second Remand Results* that upon reexamination of the level of trade issue, no level of trade adjustment is called for. *Id.*

CONTENTIONS OF THE PARTIES

Plaintiffs disagree with Commerce's *Second Remand Results*. First, plaintiffs dispute Commerce's finding that Sugiyama did not describe distinct, discernable levels of trade. Sugiyama contends it did "describe the fact that I&OC sales in the United States and E and H sales in the home market occur at different levels in the distribution system." (Pls.' Resp. to Second Remand Determination (Pls.' Resp.) at 1.) Specifically, Sugiyama argues that in its November 29, 1991, questionnaire response, it explained that I&OC is at "wholesale level 1" because it buys directly from the factory, whereas E's and H's customers are at "wholesale level 2" because they buy from the distributors who buy from the factory. (*Id.* (citation omitted).) Sugiyama further argues it "described these different points in the distribution channel in greater detail" in its December 31, 1991, response to Commerce's supplemental questionnaire. (*Id.* at 2.) Sugiyama disputes Commerce's finding that this information was insufficient. "[I]t is hard to see," Sugiyama argues, "what further information Sugiyama should have provided: it showed that its home market sales through E and H are made at a further stage in the distribution system than its U.S. sales to I&OC, involving an additional level of selling expenses in the home market." (*Id.* at 3.)

Sugiyama rejects Commerce's assertion that Sugiyama should have explained the functions of the purchasers at issue because "neither the [sic] Commerce's questionnaire nor its supplemental questionnaire asked for an explanation of the 'functions' of these purchasers." (*Id.* (footnote omitted).) Sugiyama also disputes Commerce's assertion it has a long-standing practice of requiring a description of the purchasers' functions. According to Sugiyama, the determination Commerce cites as support for its practice of examining functions "was published *after* Commerce issued its questionnaire in this review and less than one month before Commerce issued its deficiency letter." (*Id.* at 3–4 (footnotes omitted).)[5] In sum, Sugiyama argues it "can hardly be faulted for

[5] The Court notes that Sugiyama states in its comments on the *Second Remand Results* that Commerce's questionnaire and supplemental questionnaire are not dated. (*See* Pls.' Resp. at 3 n.3, 4 n.4.)

not providing information which the Department did not request." (*Id.* at 4.)

Second, plaintiffs dispute Commerce's rejection of Sugiyama's proposed alternative quantification methods. Sugiyama argues it provided: (1) "the ratio of E and H's selling expenses to their total sales"; and (2) "[f]or H, * * * data on the company's selling expenses and total sales, from which the ratio was derived." (*Id.* at 5 (citations omitted).) Sugiyama quarrels with Commerce's statements in the *Second Remand Results* questioning the data reported for Company H. Sugiyama argues Commerce "has no basis for not taking H's data at face value * * * namely as the ratio of the [company's] selling expenses to the [company's] total sales." (*Id.* (citation and internal quotation marks omitted).)

Sugiyama disputes Commerce's statement in the *Second Remand Results* that "'Sugiyama would still need to demonstrate that selling expense differences were due, at least in part, to selling at different levels of trade.'" (*Id.* (quoting *Second Remand Results* at 10–11).) Sugiyama argues that "[b]y definition, the costs associated with an additional level in the distribution system in the home market are due to selling at a different level of trade." (*Id.*) Sugiyama adds that it "also suggested that the adjustment could be quantified by taking the difference between Sugiyama's prices to E and H, and E and H's prices to their customers." (*Id.* (citation omitted).)

Commerce contentions are manifested through Commerce's *Second Remand Results* discussed above.

Standard of Review

The appropriate standard of review of an action challenging final results by Commerce is whether Commerce's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987).

Discussion

The applicable regulations provide as follows:

> **§ 353.58 Level of trade.**
>
> The Secretary normally will calculate foreign market value and United States price based on sales at the same commercial level of trade. If sales at the same commercial level of trade are insufficient in number to permit an adequate comparison, the Secretary will calculate foreign market value based on sales of such or similar merchandise at the most comparable commercial level of trade as sales of the merchandise and make appropriate adjustments for differences affecting price comparability.

19 C.F.R. § 353.58 (1990). Commerce's regulations further provide:

> **§ 353.54 Claims for adjustment to foreign market value.**
>
> Any interested party that claims an adjustment under §§ 353.55 through 353.58 must establish the claim to the satisfaction of the Secretary.

19 C.F.R. § 353.54 (1990). It is apparent that the burden of supporting a claim for a level of trade adjustment lies with the party claiming that adjustment. *See Fujitsu Gen. Ltd. v. United States,* Slip Op. 95–44 at 28, (Mar. 14, 1995) (stating the foreign respondent "has the burden of supporting its claim for a level of trade adjustment and not Commerce") (citation omitted), *appeal docketed,* No. 95–1343 (Fed. Cir. May 11, 1995); *Florex v. United States,* 13 CIT 28, 35, 705 F. Supp. 582, 590 (1989) ("Plaintiffs have the burden of supporting their claim for a level of trade adjustment.") (citations omitted); *Fundicao Tupy S.A. v. United States,* 12 CIT 6, 8, 678 F. Supp. 898, 900 (three-judge panel) ("[I]t is a legal and administrative fact of life that the measurement of this [adjustment] is a duty of the [Commerce] which has the authority to impose such reasonable burdens of proof on the parties to the investigation as may be necessary to reach a final determination."), *aff'd,* 7 Fed. Cir. (T) 9, 859 F.2d 915 (1988); *American Permac, Inc. v. United States,* 12 CIT 1134, 1138, 703 F. Supp. 97, 101 (1988) (finding the burden of proof imposed upon plaintiffs "in this case" was not reasonable).

Here, plaintiffs have simply failed to establish to the satisfaction of Commerce that a level of trade adjustment is warranted. Sugiyama claims sales by Sugiyama to I&OC are at a different level of trade than sales by Companies E and H to unrelated customers. Sugiyama explains its primary suggested quantification method as involving utilization of Companies E's and H's selling expenses. (*See* Pls.' Resp. at 5.) Sugiyama adds it "also suggested that the adjustment could be quantified by taking the difference between Sugiyama's prices to E and H, and E and H's prices to their customers." (*Id.*)

Commerce's determination that Sugiyama has failed to quantify the claimed adjustment and to prove different levels of trade exist is supported by substantial evidence and is otherwise in accordance with law. First, according to Commerce, Companies E and H are both related to Sugiyama.[6] While it is possible that related party selling expenses may be used to establish a level of trade adjustment, Commerce "closely scrutinizes the claimed selling expenses of a related sales company before granting a level of trade adjustment." *Zenith Elecs. Corp. v. United States,* 11 Fed. Cir. (T) ____, ____, 988 F.2d 1573, 1584 (1993); *see e.g., Silver Reed Am., Inc. v. United States,* 13 CIT 286, 288–89, 711 F. Supp. 627, 629 (1989) (denying a claimed level of trade adjustment based on expenses incurred by a related selling subsidiary and finding, based on the record before the Court, that Commerce had properly determined plaintiff had "complete discretion as to where to place any of its sales

[6] *See supra* note 1.

functions and where to account for expenses without affecting total corporate profit"). Sugiyama's proffered support for its sales expense quantification was simply inadequate to withstand this scrutiny.

More importantly, however, Sugiyama has failed to show different levels of trade in fact exist. Sugiyama has never established that related Companies E and H should not be regarded as Sugiyama itself so that sales by Companies E and H to their respective customers are at a different level than sales by Sugiyama to I&OC. All Sugiyama appears to have done is state, as if it were an established fact, that the two areas of sales are at different levels.

The Court notes a recent decision by the United States Court of Appeals for the Federal Circuit (CAFC) dealing in part with a claimed level of trade adjustment. *See NEC Home Elecs., Ltd. v. United States,* No. 94–1390 (Fed. Cir. Apr. 28, 1995). The factual background of the case is as follows. NEC Home Electronics, Ltd. (NEC) owned a Japanese subsidiary that manufactured consumer electronic products, including color televisions. *Id.* at 2. During the review period at issue, all televisions the Japanese manufacturer sold in the Japanese market were sold to affiliated sales companies. *Id.* at 6. These affiliated sales companies then sold to unrelated Japanese-market retailers who sold to end-users. *Id.* In its administrative review, Commerce refused to use the related-party sales in its computation of foreign market value. *Id.* at 3. Commerce also concluded that NEC had failed to sufficiently quantify, and therefore was not entitled to, a claimed level of trade adjustment. *Id.*

For reasons not discussed here, the CAFC remanded on the issue of Commerce's refusal to use related-party sales in its computation of foreign market value. *Id.* at 16–17. The CAFC also held that if Commerce refused to use the related-party sales in its calculation of foreign market value on remand, Commerce must also revisit the issue of NEC's claimed level of trade adjustment. *Id.* at 21. The Court observed that, in support of its claim, NEC had provided Commerce with the following: (1) evidence regarding the average "gross margins," or total distributor mark-up, which included the general, selling, and administrative expenses plus profits, of NEC's related wholesalers in its home market; (2) a suggested quantification of the claim the total distributor mark-up as the measure of the level of trade adjustment; (3) data on direct and indirect selling expenses incurred by the related wholesalers; (4) an alternative quantification measure of total selling expenses should Commerce reject "gross margin" as the proper measure; and (5) evidence submitted through affidavits on the basis of which NEC argued the distribution costs of the affiliated sales companies were consistent with average industry costs at the wholesale level. *Id.* at 20–21. The CAFC determined that, on remand, Commerce should consider whether either of NEC's proffered methods of computing a level of trade adjustment are satisfactory, "and if not, state the reasons for their rejection." *Id.* at 21.

In the present case, Commerce has now adequately explained its rejection of Sugiyama's claimed level of trade adjustment. Furthermore, as described in this opinion, the support Sugiyama has offered to Commerce falls short of what the foreign producer in *NEC* appears to have offered. The Court further notes plaintiffs' evidence in the present case does not approach, for example, that which was offered in *American Permac, Inc. v. United States,* 12 CIT 1134, 703 F. Supp. 97 (1988).[7]

Plaintiffs maintain that the determination Commerce cites as support for its practice of examining functions of the purchasers at issue "was published *after* Commerce issued its questionnaire in this review and less than one month before Commerce issued its deficiency letter." (Pls.' Resp. at 3–4 (footnotes omitted) (referring to *Potassium Permanganate*).) Plaintiffs argue that Sugiyama cannot be faulted for not providing information Commerce did not request. The Court recognizes that Commerce cannot establish an unreasonably high burden for plaintiffs seeking a level of trade adjustment. *See, e.g., NEC Home Elecs.,* No. 94–1390 at 19–20; *American Permac,* 12 CIT at 1138–39, 703 F. Supp. at 101; *Fundicao Tupy,* 12 CIT at 8, 678 F. Supp. at 900. Based on the record before it, however, this Court finds that even without Commerce's assertion that its practice is to look to the functions of the purchasers at issue, Sugiyama has failed to meet its burden of supporting its claim for a level of trade adjustment. Accordingly, this Court finds Commerce's determination that no level of trade adjustment is merited in this case is supported by substantial evidence and is otherwise in accordance with law.

CONCLUSION

The Court sustains the results of Commerce's second remand determination concerning the administrative review in *Roller Chain, Other Than Bicycle, From Japan,* 57 Fed. Reg. 56,319 (Dep't Comm. 1992) (final results), as amended by *Roller Chain, Other Than Bicycle, From Japan,* 57 Fed. Reg. 58,285 (Dep't Comm. 1992) (final results). The Court dismisses this action.

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[7] In *American Permac,* a German respondent sought review of Commerce's refusal to make adjustments for differences in levels of trade between the foreign and United States markets. *American Permac,* 12 CIT at 1135, 703 F. Supp. at 99. The respondent sold directly to end-users in the German market, whereas its United States subsidiary made the majority of its United States sales on a wholesale basis to distributors. *Id.* at 1135, 703 F. Supp. at 99. To support its claim, the German respondent submitted the following: (1) the argument that a 30 percent discount from the list price of the merchandise, given to all United States distributors, represented the appropriate adjustment; (2) "a detailed accounting study of the actual expenses which [respondent] would not have to incur in Germany if it sold the merchandise to distributors, rather than to end-users"; (3) the argument "that these expenses represent precisely the amount of an appropriate level of trade adjustment"; (4) data relating to respondent's sale in Austria through a distributor, and the argument that "since Austrian and German markets are very similar, the actual sale prices to distributors in Austria is a reliable and acceptable measurement of a level of trade adjustment[] to their home market prices"; (5) a suggested methodology involving the use of the price structure of another German company, also subject to the administrative review, which sold products in Germany during the relevant time to both end-users and distributors; and (6) a suggested methodology of measuring the level of trade adjustment "by reference to plaintiffs' home market sales of forms handling machinery, which were made at both levels of trade, but which were not subject to this review." *Id.* at 1135–36, 703 F. Supp. at 99.

(Slip. Op. 95–117)

UNITED STATES, PLAINTIFFS *v.* HITACHI AMERICA, LTD., AND HITACHI, LTD., DEFENDANT

Court No. 93–06–00373

(Dated June 23, 1995)

AMENDED ORDER

MUSGRAVE, *Judge:* Upon further review of this Court's order issued in this matter on June 21, the Court hereby amends said order to include the following:

> The Court notes that the redacted documents purport to be supported by unredacted documents. However, some of the unredacted documents do not appear to be reproduced completely in their original form. In addition, there is no discernable correlation between the content of the redacted and unredacted volumes.

THEREFORE, the order of June 21, 1995 remains in effect.

(Slip Op. 95–118)

NACHI-FUJIKOSHI CORP., NACHI-AMERICA, INC., AND NACHI TECHNOLOGY, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP. AND TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 92–07–00502

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record, challenging certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 57 Fed. Reg. 28,360 (1992). Plaintiffs allege that the following actions by Commerce, with respect to Japan, were unsupported by substantial evidence on the administrative record and were not in accordance with law: (1) inclusion of plaintiffs' air freight shipments occurring during Commerce's sampled six-week period in the exporter's sales price database and (2) disallowance of a certain rebate claimed by plaintiffs.

Held: The Court finds that (1) Commerce's six-week sample of plaintiffs' high volume exporter's sales price transactions, inclusive of air freight shipments, was generally representative of plaintiffs' period-of-review sales and was properly used to calculate United States price; and (2) plaintiffs' inadequately substantiated claimed rebate was properly excluded in Commerce's calculation of foreign market value.

[Plaintiffs' motion denied; case dismissed.]

(Dated June 23, 1995)

O'Melveny & Myers (*Greyson L. Bryan, Bruce R. Hirsh* and *Steven A. Spencer*) for plaintiffs Nachi-Fujikoshi Corporation, Nachi-America, Inc. and Nachi Technology, Inc.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*A. David Lafer* and *Marc E. Montalbine*); of counsel: *Stephen J. Claeys* and *Stacy J. Ettinger,* Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, Larry Hampel, Joseph A Perna, V* and *J. Eric Nissley*) for defendant-intervenor Federal-Mogul Corporation.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., John M. Breen, Margaret L.H. Png* and *Robert A. Weaver*) for defendant-intervenor The Torrington Company.

OPINION

TSOUCALAS, *Judge:* Plaintiffs Nachi-Fujikoshi Corporation, a producer and exporter of antifriction bearings, and its U.S. subsidiaries, Nachi-America, Inc. and Nachi Technology, Inc. (collectively "Nachi") move for judgment on the agency record pursuant to Rule 56.2 of the Rules of this Court. In their motion, plaintiffs contest the final results of administrative review issued by the United States Department of Commerce, International Trade Administration ("Commerce"), concerning antifriction bearings ("AFBs") from Japan. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 57 Fed. Reg. 28,360 (1992). Specifically, Nachi claims that Commerce improperly (1) included its sampled sales shipped to the United States via air freight in the exporter's sales price ("ESP") database, and (2) disallowed a certain rebate claimed by Nachi. Nachi contends that these errors caused Commerce to overstate its dumping margin and rendered Commerce's Final Results unsupported by substantial evidence and contrary to law.

Defendant-intervenors Federal-Mogul Corporation ("Federal-Mogul") and The Torrington Company ("Torrington") oppose Nachi's challenge.

BACKGROUND

Commerce published antidumping duty orders on ball bearings, cylindrical roller bearings and spherical plain bearings and parts thereof from Japan, Germany, France, Italy, Romania, Singapore, Sweden, Thailand and the United Kingdom. *See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan,* 54 Fed. Reg. 20,904 (1989).[1]

On June 28, July 19 and August 14, 1991, the ITA announced its initiation of administrative reviews of these orders with respect to sixty-three manufacturers and exporters, including Nachi-Fujikoshi Corporation and Nachi-America, Inc., for the period May 1, 1990

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[1] *See also Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 20,900 (1989); 54 Fed. Reg. 20,902 (France); 54 Fed. Reg. 20,903 (Italy); *Antidumping Duty Order: Ball Bearings and Parts Thereof From Romania,* 54 Fed. Reg. 20,906 (1989); *Antidumping Duty Order of Sales at Less Than Fair Value: Ball Bearings and Parts Thereof From Singapore,* 54 Fed. Reg. 20,907 (1989); *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Parts Thereof From Sweden,* 54 Fed. Reg. 20,907 (1989); *Antidumping Duty Order and Amendment to the Final Determination of Sales at Less Than Fair Value: Ball Bearings and Parts Thereof From Thailand,* 54 Fed. Reg. 20,909 (1989); *Antidumping Duty Orders and Amendments to the Final Determinations of Sales at Less Than Fair Value: Ball Bearings, and Cylindrical Roller Bearings and Parts Thereof From the United Kingdom,* 54 Fed. Reg. 20,910 (1989).

through April 30, 1991. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Administrative Reviews,* 56 Fed. Reg. 29,618 (1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 56 Fed. Reg. 33,251 (1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 56 Fed. Reg. 40,305 (1991).

On March 31, 1992, Commerce issued its preliminary determinations in these second administrative reviews. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 57 Fed. Reg. 10,868 (1992).[2]

On June 24, 1992, the ITA published the consolidated Final Results of these nine administrative reviews. *Final Results,* 57 Fed. Reg. at 28,360.

Discussion

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed. Cir. 1990).

1. *Nachi's Air Freight Shipments:*

In this review, Commerce sampled exporter's sales price transactions falling within a six-week period for each class or kind of merchandise where sales of such merchandise exceeded 2,000 transactions. Commerce's six-week sampling captured certain sales of AFBs shipped by Nachi via air freight to the United States.

Nachi asserts that it made its air freight shipments of AFBs on an *ad hoc* basis and that one third of these ESP transactions occurred during the six-week sample period. *Plaintiffs', Nachi-Fujikoshi Corporation, Nachi-America, Inc. and Nachi Technology Inc., Memorandum in Support of Their Motion for Judgment on an Agency Record* ("*Nachi's Brief*") at 6. Nachi claims that, had Commerce tested, it would have found that its air freight transactions had not occurred evenly through-

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[2] *See also Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 57 Fed. Reg. 10,859 (1992); 57 Fed. Reg. 10,862 (Federal Republic of Germany); 57 Fed. Reg. 10,865 (Italy); 57 Fed. Reg. 10,875 (Sweden); 57 Fed. Reg. 10,878 (United Kingdom); *Ball Bearings and Parts Thereof From Romania; Preliminary Results Antidumping Duty Administrative Review,* 57 Fed. Reg. 10,871 (1992); 57 Fed. Reg. 10,873 (Singapore); *Ball Bearings and Parts From Thailand; Preliminary Results of Antidumping Duty Administrative Review and Partial Termination of Administrative Review,* 57 Fed. Reg. 10,877 (1992).

out the period of review. *Nachi's Brief* at 5. In addition, Nachi contends that its air freight charges for sampled ESP transactions accounted for over one half of the total costs for all of its period-of-review ESP sales. *Id.* at 6–7. Nachi maintains that the distortive effect of this air freight anomaly rendered Commerce's sample unrepresentative and argues that section 777A(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677f–1(b) (1988), requires that samples be representative. *Id.* at 4–5.

It is Nachi's position that, in the interest of fairness in pricing comparisons, Commerce should adjust for this air freight anomaly. *Id.* at 8–9. Therefore, Nachi requests that the Court instruct Commerce to exclude its sampled air freight shipments from the ESP sales database or, alternatively, that it multiply [ ] against the potential duties calculated for ESP air freight transactions instead of employing the higher multiplier of 8.69. Nachi explains that the 8.69 figure represents the ratio of total weeks in the year to sampled weeks, whereas its preferred multiplier represents the ratio of period-of-review air freight charges to sampled air freight charges. *Id.* at 3, 7; *Plaintiffs', Nachi-Fujikoshi Corporation, Nachi-America, Inc. and Nachi Technology Inc., Reply Brief in Support of its Motion for Judgment on an Agency Record* at 4.

In the Final Results, Commerce rejected Nachi's arguments stating:

> In choosing a random time-sampling methodology, we have acted within the authority granted to the Department under section 777A to "use averaging and generally recognized sampling techniques." Nachi does not argue that the time-sampling technique in general produces unrepresentative results, but that the particular sample selected using this technique has an air freight anomaly which must be adjusted. However, insofar as the Department has selected a representative sample, that sample must be considered to be reflective of the broad range of Nachi's sales transactions. Therefore, acting upon Nachi's proposals would compromise this sample and skew the results.

Final Results, 57 Fed. Reg. at 28,399. Commerce adheres to that position. *See Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Agency Record* ("*Defendant's Brief*") at 8. In addition, Commerce points out that its sampled six weeks were chosen at random, one week from each two-month interval during the period of review. *Defendant's Brief* at 7. Commerce argues that, in view of Nachi's enormous number of ESP transactions for this period of review, it would not have been feasible or efficient to test in order to determine whether air freight transactions occurred evenly throughout the period before resorting to sampling. *Id.* at 9–10.

Federal-Mogul and Torrington support Commerce's inclusion of Nachi's ESP transactions, for which air freight charges were incurred, in the ESP sample of sales analyzed. *Opposition of Federal-Mogul Corporation, Defendant-Intervenor, to Plaintiffs' Motion for Judgment on an Agency Record* ("*Federal-Mogul's Brief*") at 3–10; *Opposition of The Torrington Company to Plaintiffs' Motion for Judgment on the Agency Record* ("*Torrington's Brief*") at 3–9.

The antidumping law expressly permits the use of sampling. Title 19, United States Code, section 1677f–1 states:

> **§ 1677f–1. Sampling and averaging**
> **(a) In general**
> For the purpose of determining United States price or foreign market value under sections 1677a and 1677b of this title, and for purposes of carrying out annual reviews under section 1675 of this title, the administering authority may—
> (1) use averaging or generally recognized sampling techniques whenever a significant volume of sales is involved or a significant number of adjustments to prices is required, and
> (2) decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise.
> **(b) Selection of samples and averages**
> The authority to select appropriate samples and averages shall rest exclusively with the administering authority; but such samples and averages shall be representative of the transactions under investigation.

Thus, although sampling may be used under the circumstances described in subsection (a) of the statute, sampling may not be utilized in a manner which produces unrepresentative results. 19 U.S.C. § 1677f–1(b).

The Court has recognized that Commerce has been given broad discretion in its sample selection methodology. *GMN Georg Muller Nurnberg AG v. United States,* 15 CIT 174, 179, 763 F. Supp. 607, 612 (1991). *See also Asociacion Colombiana de Exportadores de Flores v. United States,* 13 CIT 13, 20–22, 704 F. Supp. 1114, 1120–22 (1989), *aff'd,* 901 F.2d 1089 (Fed. Cir.), *cert. denied,* 498 U.S. 848 (1990); *Floral Trade Council v. United States,* 12 CIT 1163, 704 F. Supp. 233 (1988). In the instant case, Commerce reasonably exercised its discretion by using a random time-sampling methodology to select sample sales for the calculation of USP. Nachi does not dispute that sampling was appropriate in this case in view of its high volume of ESP transactions.

The sampling provision was implemented to ease the administrative burden on Commerce of examining every single transaction in a review and to afford Commerce flexibility in complex investigations. *See* H.R. Rep. No. 725, 98th Cong., 2d Sess. 45–66 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4910, 5172–73. *See also Floral Trade Council,* 12 CIT at 1167, 704 F. Supp. at 237. Conducting a pre-sampling investigation would have been time-consuming and inefficient and, hence, an ineffective work-saving device. *Cf. Floral Trade Council,* 12 CIT at 1168, 704 F. Supp. at 238. Therefore, testing to determine whether Nachi's air freight transactions occurred evenly throughout the period of review would have defeated the intended purpose of 19 U.S.C. § 1677f–1.

Moreover, Commerce's sample was essentially representative of Nachi's period-of-review exporter's sales price transactions. Nachi concedes that Commerce confirmed that its bearing sales were consistent during the period of review. *Nachi's Brief* at 5. Further, Nachi does not

dispute that it incurred air freight charges throughout the period of review or that the sales captured in Commerce's six-week random sample should have, to some extent, included sales shipped to the United States by air freight. The validity of Commerce's selected sample is not called into question simply because a portion of the sampled transactions deviate from the norm. If plaintiffs' argument were accepted and carried to an extreme, Commerce would be required to test to determine each and every adjustment to U.S. price (*e.g.*, commissions, credit expenses, warranty expenses, etc., before it could resort to sampling. Furthermore, Nachi's arguments implicitly presume that the dumping margins which Commerce found were attributable to the high incidence of air freight sales during the sampled period and/or to the allegedly uncharacteristically high air freight charges incurred on those sampled transactions. It is not clear to the Court that this is the case.

Accordingly, in view of the enormous number of ESP transactions involved and the attendant administrative burden of analyzing such volume, the Court finds that Commerce's sampling methodology for analyzing Nachi's ESP sales in its calculation of USP was reasonable in application and is in accordance with law.

2. *Nachi's Claimed Rebate:*

In calculating foreign market value, Commerce disallowed Nachi's claim for a certain rebate on the basis that the claimed rebate was inadequately substantiated. Commerce's Final Results addressed the subject rebate, stating:

> Nachi first indicated that it paid the rebate to NBC [Nachi Bearings Company] and other distributors, then argued that it paid the rebate to unrelated customers of NBC and related distributors. We have been unable to determine from the evidence on the record to whom this rebate was paid. Due to this ambiguity, we have disallowed this rebate claim for the final results.

Final Results, 57 Fed. Reg. at 28,402.

Nachi takes issue with Commerce's disallowance of the subject rebate, arguing that the rebate was paid to unrelated customers of NBC and to other related distributors who were later reimbursed by Nachi-Fujikoshi Corp. ("NFC"). *Plaintiffs' Brief* at 10. Nachi states that its Section C Supplemental Response explained to Commerce that the subject rebate was paid by NFC to NBC and certain other distributors in accordance with the amount of payment which those customers make in cash. *Id.* Nachi also explains that it provided Commerce with an example of how this rebate was calculated, as well as with a customer list of unrelated rebate recipients. *Id.* Nachi argues that, in the less than fair value investigation and in the first administrative review, its description of the reported rebate contained language identical to that used in the second review questionnaire response and Commerce verified, accepted and treated the rebate as a direct expense. Nachi requests that the Court instruct Commerce to allow the claimed rebate in this instance as well. *Id.* at 12.

Commerce, however, contends that, although it allowed five of Nachi's six claimed rebate programs, it disallowed the rebate at issue because it was unable to reconcile Nachi's post-preliminary determination explanation with the explanation in its original submissions. *Defendant's Brief* at 12 (citing A.R. (Conf.) Doc. No. 294 at 3–4).

Federal-Mogul and Torrington support Commerce's exclusion of Nachi's claimed rebate. *Federal-Mogul's Brief* at 10–13; *Torrington's Brief* at 9–12.

The Court finds Nachi's argument on this issue unpersuasive. Nachi argues here, as it argued below, that the rebate at issue was paid to unrelated customers of NBC and other related distributors, who were later reimbursed by NFC. *Plaintiffs' Brief* at 10; A.R. (Conf.) Doc. No. 294 at 3–4. In response to Commerce's Section C Questionnaire, however, Nachi reported that the subject rebate was paid to [ ]. A.R. (Conf.) Doc. No. 107 at Exhibit C/50. Faced with conflicting interpretations, Commerce reasonably was unable to determine from the record to whom the subject rebate was actually paid. In addition, neither Nachi's illustration of how this rebate was calculated, nor its list of rebate recipients, resolves this question.

Respondents have the burden of creating an adequate record to assist Commerce's determinations. *Tianjin Mach. Import and Export Co. v. United States,* 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992); *see also Chinsung Indus. Co. v. United States,* 13 CIT 103, 705 F. Supp. 598 (1989); *Smith-Corona Group Consumer Prods. Div., SCM Corp. v. United States,* 713 F.2d 1568, 1577 n.26 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984); *Timken Co. v. United States,* 11 CIT 786, 804, 673 F. Supp. 495, 513 (1987). In the case at bar, Nachi submitted ambiguous supporting documentation and must accept the consequences. *See Asociacion Colombiana,* 13 CIT at 24, 704 F. Supp. at 1124.

Commerce has been given broad discretion in making adjustments. *Smith-Corona Group,* 713 F.2d at 1577 n.26. Because Commerce was unable to ascertain from the record to whom the reported rebate was paid, Commerce reasonably disallowed Nachi's rebate claim.

Therefore, the Court finds that for the purpose of determining foreign market value, Commerce's disallowance of Nachi's inadequately substantiated claimed rebate is supported by substantial evidence on the record and is in accordance with law.

CONCLUSION

For the foregoing reasons, the Court denies plaintiffs' motion for judgment on the agency record and sustains Commerce's Final Results in all respects.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C95/51 6/20/95 Carman, J.	Steel City Corporation	95–01–00012	7314.30.50 5.1%	7314.30.1000 0.2 cents per kilo	Agreed statement of facts	Cleveland Vinyl-coated galvanized steel fencing, Dura-Mesh wire fence
C95/52 6/21/95 Musgrave, J.	Fabil Manufacturing Co.	88–06–00466	Various provisions of Schedule 3, TSUS, various rates	376.56 16% (1981 and prior); 15% (1982); 13.5% (1983); 12.1% (1984); etc.	Agreed statement of facts	New York Clothing jackets with style numbers: 9228, 9229, 9481
C95/53 6/21/95 Musgrave, J.	Fabil Manufacturing Co.	88–08–00684	Various provisions of Schedule 3, TSUS, various rates	376.56 16% (1981 and prior); 15% (1982); 13.5% (1983); 12.1% (1984); etc.	Agreed statement of facts	New York Clothing jackets with style numbers: 9631, 9633

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